1-1-2021

# Advanced Mediation

Indiana Continuing Legal Education Forum (ICLEF)

# Advanced Mediation
July 29-30, 2021
Index

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*Feature Release 4.1*
August 2020

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230 East Ohio Street, Suite 300
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# ADVANCED MEDIATION

July 29-30, 2021

www.ICLEF.org

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The information and procedures set forth in this practice manual are subject to constant change and therefore should serve only as a foundation for further investigation and study of the current law and procedures related to the subject matter covered herein. Further, the forms contained within this manual are samples only and were designed for use in a particular situation involving parties which had certain needs which these documents met. All information, procedures and forms contained herein should be very carefully reviewed and should serve only as a guide for use in specific situations.

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# ADVANCED MEDIATION

## Agenda

July 29, 2021

1:30 P.M. Registration

2:00 P.M. Tips for a Successful Mediation
*- Discussion Led by Sam Ardery and Pete Schroeder*

**3:30 P.M. Refreshment Break**

3:45 P.M. Selected Topics from "Positively Conflicted"
*- Discussion Led by Sam Ardery, author*

5:15 P.M. Adjourn Day One

**5:30 P.M. Hosted Reception**

7:30 P.M. Free Time

July 30, 2021

8:30 A.M. Continental Breakfast

9:00 A.M. Recent Rule Changes and Cases; the Multi-Party Case; and Working with Difficult People
*- Discussion Led by Denise Page and Ross Rudolph*

**10:30 A.M. Coffee Break**

10:45 A.M. Zooming into the Future: The Future of the Mediation Practice
*- Discussion Led by Michael Bishop and faculty*

**12:15 P.M. Adjourn**

# ADVANCED MEDIATION

## Faculty

**Mr. Michael P. Bishop - Chair**
Cohen Garelick & Glazier
8888 Keystone Crossing Blvd., Suite 800
Indianapolis, IN 46240
ph: (317) 573-8888 Ext. 255
e-mail: mbishop@cgglawfirm.com

**Mr. Samuel R. Ardery**
Bunger & Robertson
211 South College Avenue
P.O. Box 910
Bloomington, IN 47402-0910
ph: (812) 332-9295
e-mail: sardery@lawbr.com

**Ms. Denise Page**
The Mediation Group LLC
8888 Keystone Crossing, Suite 1500
Indianapolis, IN 46240
ph: (317) 569-3000
e-mail: dpage@mede8.com

**Mr. Ross E. Rudolph**
Dinsmore & Shohl LLP
25 N.W. Riverside Drive, Suite 310
Evansville, IN 47708
ph: (812) 759-5916
e-mail: ross.rudolph@dinsmore.com

**Mr. Pete Schroeder**
Norris Choplin Schroeder LLP
101 West Ohio Street, Ninth Floor
Indianapolis, IN 46204
ph: (317) 269-9330
e-mail: pschroeder@ncs-law.com

**Michael P. Bishop**
Seminar Chair, Cohen Garelick & Glazier, Indianapolis

Named as an *Indiana Super Lawyer* in the area of litigation beginning in 2004, *Michael Bishop* concentrates his practice in the areas of mediation, arbitration, and probate and trust litigation. He is recognized by *Best Lawyers in America* in Alternate Dispute Resolution and Arbitration and Trust and Estate Litigation since 2006. In 2008, he was selected as a Member of the *American Arbitration Association National Roster of Neutrals*. Michael has an AV Peer Rating from *Martindale-Hubbell*.

Michael received his Juris Doctorate from Indiana University Robert H. McKinney School of Law in 1980. Following graduation, he served as Law Clerk to the Honorable James E. Noland, United States District Court, Southern District of Indiana. Michael is a Fellow of the International Academy of Mediators, Fellow of the *American College of Civil Trial Mediators*, and Fellow of the *National Academy of Distinguished Neutrals*.

Mr. Bishop is a member of the faculty of the *Indiana Trial Advocacy College* and is the Chair of the annual *Advanced Civil Mediator Training course* in Indiana. Michael was a founding member of the IBA Settlement Week in 1986. He served as Chair of the ISBA ADR Section, was a member of the Board of Directors for Indiana Continuing Legal Education Forum and is Past President to the Board of Directors for the Indiana Bar Foundation. Michael received the “Excellence in Continuing Legal Education Award” from ICLEF, its highest award of achievement for commitment to continuing legal education.

Michael is also past President of the Sagamore American Inn of Court, where he continues to serve as one of the founding Benchers of the Inn.

*Michael P. Bishop-Chair*
Cohen Garelick & Glazier
8888 Keystone Crossing Blvd., Suite 800
Indianapolis, IN 46240
ph: (317) 573-8888 Ext. 255
e-mail: mbishop@cgglawfirm.com

**Samuel R. Ardery**
Bunger & Robertson, Bloomington

Sam is a national mediator, consultant, speaker, trainer, and author on conflict, negotiation, and mediation. He has mediated more than 4,000 cases and tried dozens of jury trials to verdict. He is a partner at Bunger and Robertson.

He works in legal and non-legal settings, and has an approach to conflict that encourages introspection and good health to complement internal and external business practices.

You can order a copy of his book Positively Conflicted Engaging with Courage, Compassion and Wisdom in a Combative World on Amazon:

https://www.amazon.com/Positively-Conflicted-Engaging-Compassion-Combative-ebook/dp/B08TB79KBR

In addition, Sam teaches negotiation at the Indiana University Maurer School of Law where he has been distinguished as outstanding adjunct faculty. He has taught hundreds of law students who practice around the world.

Sam has mediated multi-party complex cases in areas including construction, personal injuries, contracts, professional liability, and diverse regulatory issues with some of the largest national and international law firms.

He is a frequent speaker on negotiation and mediation. Sam consults and trains on conflict with legal and non-legal institutions.

Sam has been recognized for his professional achievements in a number of forums, but only his family really cares.

He has trained at the Harvard Program on Negotiation and the Strauss School of Alternative Dispute Resolution at Pepperdine University among other places. You can learn more on his website:

https://www.samardery.com/

*Samuel R. Ardery*
Bunger & Robertson
211 South College Avenue
P.O. Box 910
Bloomington, IN 47402

Tel: (812) 332-9295
Fax: (812) 331-8808
e-mail: sardery@lawbr.com
Website:www.lawbr.com

**Denise Page**
The Mediation Group LLC, Indianapolis

*Denise Page* has been a mediator and arbitrator for the last 20 years and has been with The Mediation Group for fifteen years. She mediates personal injury, fire loss, construction, real estate, contracts and other business dispute cases. She also mediates sexual assault, employment, legal and medical malpractice cases and negligence claims against schools, nursing homes and corporate defendants.

Denise has mediated two church bus accidents with a combined total of over 50 injury and death claims. She was selected as an arbitrator for the personal injury and death claims against the State of Indiana and other defendants resulting from the stage collapse at the Indiana State Fair. She has been named Lawyer of the Year for 2017 in arbitration by Best Lawyers.

Denise has served as a speaker at seminars for lawyers, paralegals, insurance claims adjusters and for law school classes. She has taught law classes for Indiana Vocational Technical College and the adult program at Marian University.

Her law practice began in 1977 with the law firm of Hilgedag, Johnson, Secrest & Murphy in the areas of business, real estate, personal injury, construction and family law. Later, with Meils, Zink, Thompson, Dietz & Page, she became an insurance defense lawyer while maintaining a plaintiff's personal injury practice. Denise continued her career in litigation with Sheeks, Ittenbach & Page.

A former professional singer, Denise writes humorous operas for children that have been performed in Australia and all over the United States by many colleges and opera companies, from the University of California to the University of Central Florida, and Ft. Worth Opera to Nashville Opera. In the past, she has been commissioned to write shows for the Indianapolis Children's Museum Guild and has written and recorded children's songs for the Indiana Coalition Against Domestic Violence. She also continues to write musicals for children.

Volunteer work has included Child Advocates, Girl Scouts, Indianapolis Bar Association, her children's schools and many activities at North United Methodist Church where she has been the director of the children's choir, ages 5 -8, for over 30 years.

Denise plays tennis several times a week and enjoys reading, singing, spending time outdoors and watching sports. Raised on the eastside of Indianapolis, Denise graduated from Howe High School, Indiana University and the University of Notre Dame Law School. She has two children and is married to opera conductor and Butler professor, James Caraher.

*Denise Page*
The Mediation Group LLC
8888 Keystone Crossing, Suite 1500
Indianapolis, IN 46240
ph: (317) 569-3000
e-mail:dpage@mede8.com

# Bios

## Ross Rudolph

**Partner | Evansville, IN**

(812) 759-5916

ross.rudolph@dinsmore.com

Ross concentrates his practice in the areas of mediation and arbitration, including complex multi-party disputes and early neutral evaluation, fact-finding, mini-trial judge, and ADR Training/CME. Additionally, he has experience with corporate and commercial litigation, insurance defense, and appellate law.

**Appellate Cases:**

*Melton v. Stephens*, 13 N.E.3d 533 (Ind.App. 2014); *Presbytery of Ohio Valley, Inc. v. OPC, Inc.,* 973 N.E.2d 1099 (Ind. 2012); *Gill v. Evansville Sheet Metal Works, Inc.*, 970 N.E.2d 633 (Ind. 2012); *Madison Capital Co., LLC v. S & S Salvage, LLC,* 765 F.Supp.2d 923 (W.D.Ky. 2011), affirmed 507 Fed.Appx. 528 (6th Cir. 2012); *Glotzbach v. Frohman*, 854 N.E.2d 337 (Ind. 2006); *Research Systems Corp. v. IPOS Publicite*, 276 F.3d 914 (7th Cir. 2002); *Cahoon v. Cummings*, 734 N.E.2d 535 (Ind. 2000); *Mendenhall v. Skinner and Broadbent*, 728 N.E.2d 140 (Ind. 2000); *John A. Ackerman v. Northwestern Mutual Life Insurance Company,* 172 F.3d 467 (7th Cir. 1999); *Northwestern Mutual Life Insurance Company v. Stinnett,* 698 N.E.2d 339 (Ind.App. 1998); *Citizens National Bank of Evansville vs. Foster*, 668 N.E.2d 1236 (Ind. 1996); *Meyers v. Furrow Building Materials*, 659 N.E.2d 1147 (Ind.App. 1996); *Koenig v. Bedell and Aetna Insurance Company*, 601 N.E.2d. 453 (Ind.App. 1992); *Ohio Valley Communications, Inc. v. Greenwell,* 555 N.E.2d 525 (Ind.App. 1990); *Aetna Casualty & Surety Company v. Crafton*, 551 N.E.2d 893 (Ind.App. 1990); *Johnson v. Payne and National Insurance Association*, 549 N.E.2d 48 (Ind.Ct.App. 1990); *Carl Subler Trucking, Inc. v. Frank W. Splittorff*, 482 N.E.2d 295 (Ind.App. 1985).

**Education:**

- Indiana University Robert H. McKinney School of Law (J.D.)
- Miami University (B.A., *cum laude*)

**Bar Admissions:**

- Indiana

# Bios

**Court Admissions:**

- U.S. Supreme Court
- U.S. Court of Appeals for the Sixth Circuit
- U.S. Court of Appeals for the Seventh Circuit
- U.S. District Court for the Northern District of Indiana
- U.S. District Court for the Southern District of Indiana

**Affiliations/Memberships:**

- Evansville Bar Association
  - Board of Directors (2014 - 2018)
  - Diversity Committee, member and past co-chair
- Indiana State Bar Association
- 7th Circuit Bar Association
- Indiana Bar Foundation, fellow
- Defense Trial Counsel of Indiana
- Brooks American Inn of Court, past president and member
- Registered Indiana Civil Mediator
- Volunteer Lawyer Program

**Distinctions:**

- National Academy of Distinguished Neutrals (2015 – present)
- Best Lawyers®
  - Mediation Law (2015, 2019-2020)
  - Alternative Dispute Resolution (2007, 2009 - 2016)
  - Litigation – Insurance (2020)
  - Product Liability Litigation – Defendants (2020)
  - "Lawyer of the Year," Litigation – Insurance in Indianapolis (2020)
- Super Lawyers®
  - Top 50 Indiana Super Lawyers (2013 - 2016, 2018 - 2020)
  - Indiana Super Lawyers, Civil Litigation Defense (2005, 2007 - 2015)
  - Indiana Super Lawyers, Alternative Dispute Resolution (2013 - 2020)

# Bios

## Alyson M. St. Pierre

**Associate | Indianapolis, IN**

(317) 860-5386

aly.stpierre@dinsmore.com

Alyson's practice primarily focuses on employment law matters, ranging from general employment legal consulting to non-compete, confidentiality, and employment discrimination litigation.

**Services:**

- Labor
- Employment

**Education:**

- Indiana University Maurer School of Law (J.D.)
  - Merit Scholarship recipient
  - Dean's list
  - Indiana Journal of Global Legal Studies, 25 Ind. J. Global Legal Stud. 797, America's Past-time and the Art of Diplomacy
- Indiana University (B.A., *Highest Distinction*)
  - IU Hutton Honors College, General Honors

**Bar Admissions:**

Indiana

**Court Admissions:**

- Indiana Supreme Court
- U.S. District Court, Southern District of Indiana
- U.S. District Court, Northern District of Indiana

**Articles:**

- Rudolph & St. Pierre: Anyone worried about attorney-client privilege in mediation?, The Indiana Lawyer
- Wildeman and St. Pierre: Case gives employer bright-line rule on ADA unpaid leave, The Indiana Lawyer

**Federal Decisions:**

*Gralia v. Edwards Rigdon Construction Co.*, 2020 WL 5913280 (Oct. 6, 2020)

**Pete Schroeder**
Norris Choplin Schroeder LLP, Indianapolis

Pete Schroeder has been recognized by his peers as an Indiana Super Lawyer honoree for his work in alternative dispute resolution (ADR), large loss subrogation and civil litigation from 2004 to 2020. Additionally, Pete was named an Indiana Super Lawyer Top 50 Lawyer honoree from 2016 to 2018 and in 2020 and 2021. Pete was also selected to be included in the Indiana Best Lawyers 2020 list.

Pete has conducted more than 3,200 mediations including business disputes, complex and multiple party construction disputes, significant insurance coverage and insurance priority disputes, as well as complex wrongful death, quadriplegia and paraplegia, large property loss, medical and legal malpractice, products liability claims and claims involving multiple parties. Pete has mediated throughout the Midwest and frequently travels to different states to conduct mediations. In cases where the number of parties exceeds 8, Pete and fellow firm mediator, Rick Norris, have conducted mediations in tandem.

Pete is in the unique position to continue his litigation and trial practice while handling a robust mediation case load. In addition to his ADR work, Pete concentrates his practice in areas of commercial litigation, large loss subrogation and personal injury. His trial experience includes representing plaintiffs and defendants in motor vehicle accidents, fires and gas explosions, structural collapses, personal injury and wrongful death, professional malpractice and products liability. Pete has litigated products cases ranging from cranes, front-end loaders and large, industrial rack systems, to medical products, motor vehicles and manufacturing equipment. Pete has also litigated and mediated legal fee disputes and law firm dissolutions.

Pete speaks at continuing legal education seminars on mediation and litigation. He began serving as the president of the Indianapolis Law Club in September 2019. He provides consultations on case evaluations and litigation strategy and has served as an expert witness in legal malpractice cases.

An attorney of more than 40 years, Pete began his practice with the firm in 1981. Before that, he served a clerkship for Judge Eugene N. Chipman of the Indiana Court of Appeals in 1980 and 1981.

Pete was born in Detroit, Michigan. For more than 40 years, he officiated college and high school wrestling and has volunteered as a junior high wrestling coach. Pete has been active in the local community, serving on various school boards and church commission

*Pete Schroeder*
Norris Choplin Schroeder LLP
101 West Ohio Street, Ninth Floor
Indianapolis, IN 46204
ph: (317) 269-9330
e-mail: pschroeder@ncs-law.com

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## Alyson M. St. Pierre

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## Zooming Into the Future: The Future of the Mediation Practice……Michael P. Bishop

# Section One

# Tips for a Successful Mediation

**Samuel R. Ardery**
Bunger & Robertson
Bloomington, Indiana

**Pete Schroeder**
Norris Choplin Schroeder LLP
Indianapolis, Indiana

## Section One

# Notes

# Notes

# Section Two

# Positively Conflicted
# Engaging with Courage, Compassion, and Wisdom in a Combative World

**Samuel R. Ardery**
Bunger & Robertson
Bloomington, Indiana

## Section Two

**Positively Conflicted**
**Engaging with Courage, Compassion,**
**and Wisdom in a Combative World……. Samuel R. Ardery**

PowerPoint Presentation

# Positively Conflicted

*Engaging with courage, compassion,*

*And wisdom in a combative world.*

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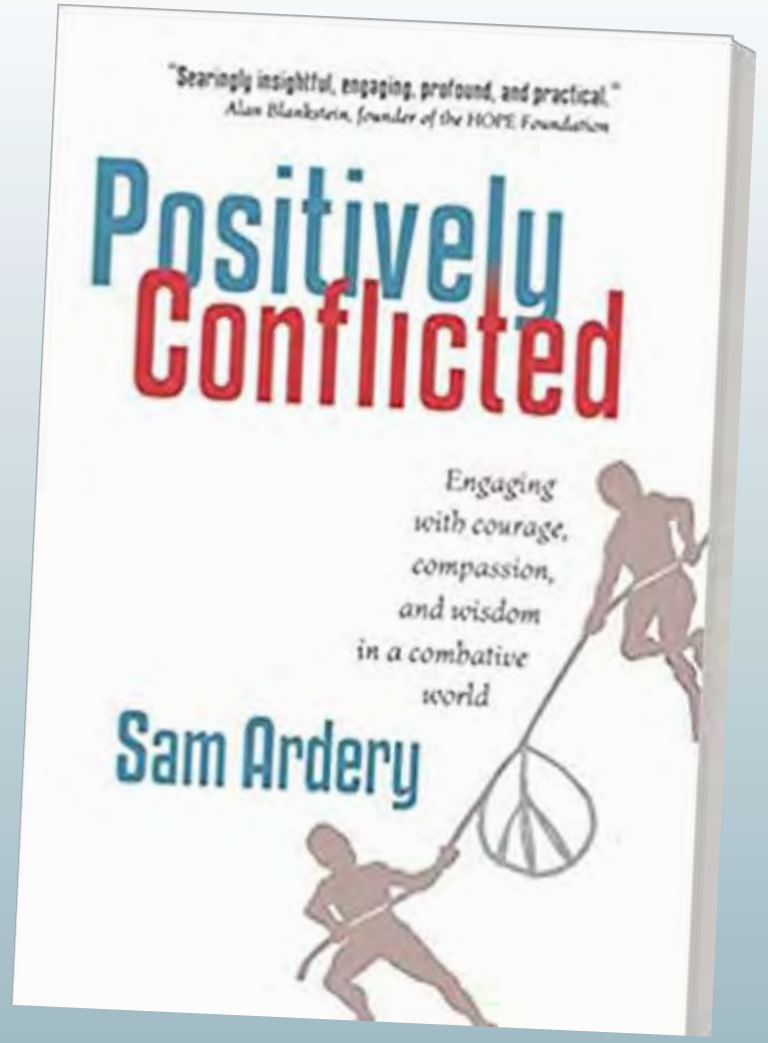
July 29-30, 2021



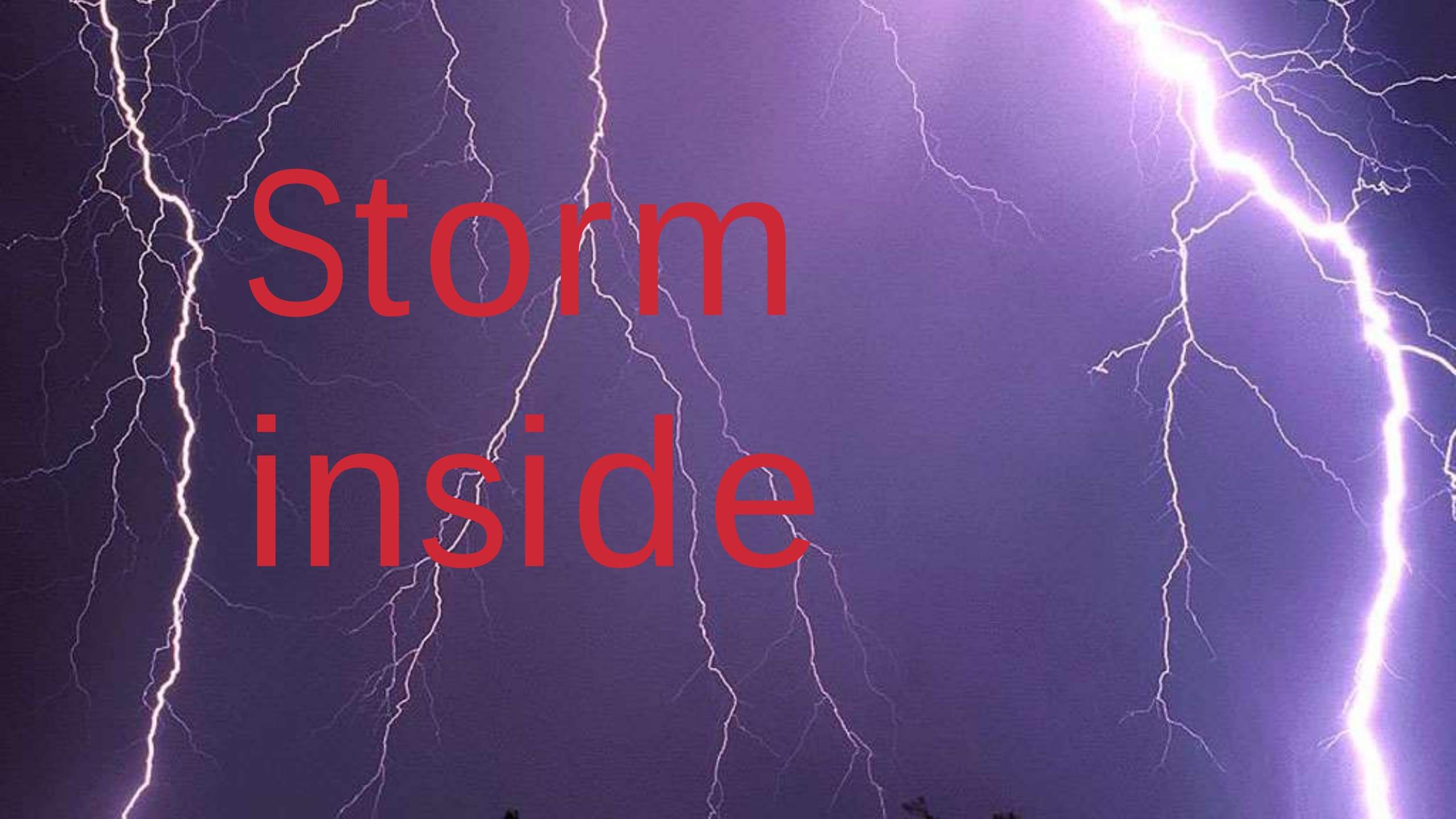

Sam Ardery

POSITIVELY CONFLICTED


Conflict arises whenever opposing forces or desires collide and cannot be readily reconciled.

# The natural response to conflict

**Why don't you change so I'll feel better?**


Storm
inside

# Internal Conflict

# Five things

in life

Priorities we all juggle

1. Recreation
2. Belief system
3. Health/Wellness
4. Work/School
5. Social/Family

# The justice gene

# The same thing or different?

## Fairness

What an individual thinks is fair

## Justice

System enforcement of fair

## Principles

Moral tenets

# 3 Initial conflicts

## Clients

Think in black and white

## Lawyers

Advocate black and white

## Mediators

Explore the gray


Trust

# Trust Equation

$$\text{Trust} = \frac{\text{credibility} + \text{reliability} + \text{vulnerability}^*}{\text{self-interest}}$$

*Source:* David Maister, *The Trusted Advisor,* (New York, Free Press, 2000)

*intimacy instead of vulnerability

# Fear

So afraid we call fear other things:

Stress Dread Anxiety

Distress Concern

Discomfort Apathy Nervousness

# 4 most prominent fears of LOSING:

Survival Esteem Power **Comfort**

# Power

# Forms and approaches

1

Kinds

2

Imbalances

3

Mediator responses


Radical
Listening

# 1% chance you are wrong?

# Positively Conflicted

*Fear it less. Do it better.*

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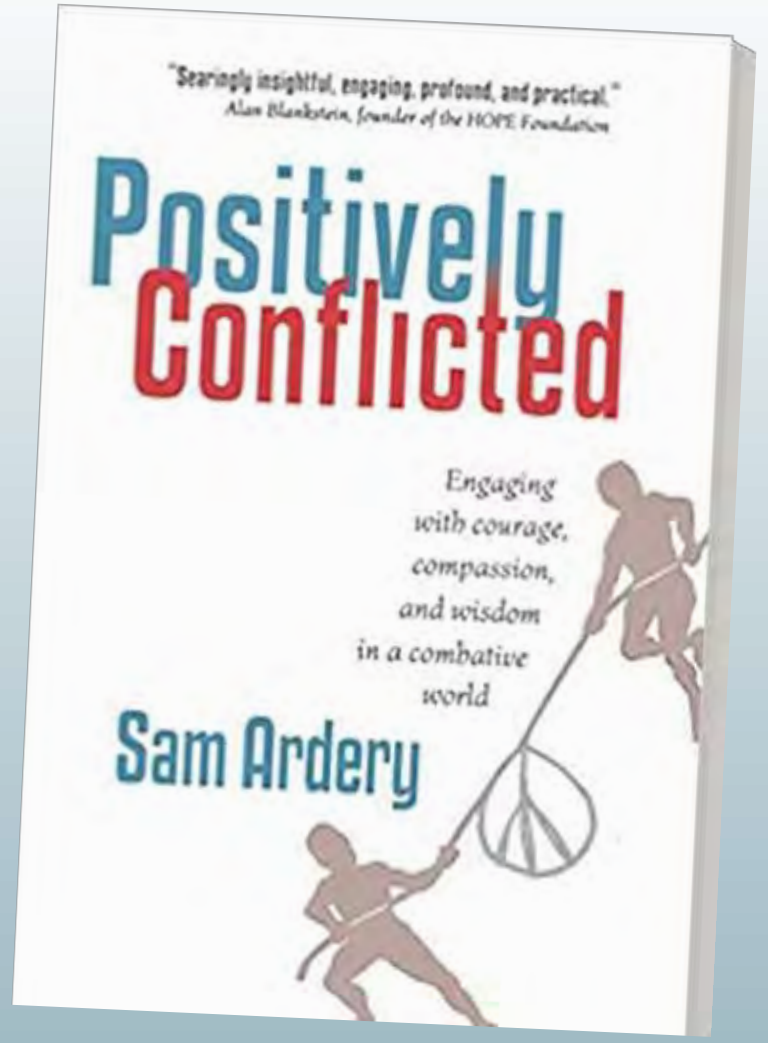


Sam Ardery

POSITIVELY CONFLICTED

# Stay in touch

| | |
|---|---|
| Blog | Samardery.com |
| Instagram | @samardery |
| LinkedIn | Sam Ardery |
| Email | sardery@lawbr.com |

# Section Three

# Recent Rule Changes and Cases; The Multi-Party Case; and Working with Difficult People

**Ross E. Rudolph**
Dinsmore & Shohl LLP
Evansville, Indiana

**Alyson M. St. Pierre**
Dinsmore & Shohl LLP
Evansville, Indiana

## Section Three

## Recent Rule Changes and Cases; The Multi-Party Case; and Working with Difficult People…….. Ross E. Rudolph
## Alyson M. St. Pierre

Dinsmore

# Advanced Mediation Seminar

## Materials

**ROSS RUDOLPH**
**ALYSON M. ST. PIERRE**

JULY 29-30, 2021

# Indiana
# ADR Rules

# EFFECTIVE JANUARY 1, 2021

## Rule 8.3. Agreement to Mediate.

Before beginning a mediation under this Rule, participants must sign a written Agreement to Mediate substantially similar to the one shown as Form A to these rules. This agreement must provide for confidentiality in accordance with Alternative Dispute Resolution Rule 2.11; it must acknowledge judicial immunity of the mediator equivalent to that provided in Alternative Dispute Resolution Rule 1.5; and it must require that all provisions of any resulting mediation settlement agreement must be written and signed by each person and any attorneys participating in the mediation.

Persons participating in mediation under this Rule shall have the same ability afforded litigants under Trial Rule 26(B)(2) of the Rules of Trial procedure to obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a settlement under this Rule or to indemnify or reimburse for payments made to satisfy a settlement under this Rule.

**DISCUSSION:**

What is the remedy/enforcement right if non-compliance occurs after a request for the limits of liability (all limits of liability)? Can you file a motion for preliminary determination as in a medical malpractice action under Trial Rule 12(D)?

# 2021 Proposed Rules

**(COMMENTS WERE RECEIVED UNTIL 13:00 HOURS EDT MONDAY, APRIL 23)**

# Changes and Proposed Amendments

RULE 1. GENERAL PROVISIONS

**Rule 1.1. Recognized Alternative Dispute Resolution Methods**

Alternative dispute resolution methods which are recognized include settlement negotiations, non-binding arbitration, mediation, conciliation, facilitation, mini-trials, summary jury trials, private judges and judging, convening or conflict assessment, neutral evaluation and fact-finding, multi-door case allocations, ~~and~~ negotiated rulemaking, parenting coordination, and collaborative law practice.

**Rule 1.2. Scope of These Rules**

Alternative dispute resolution methods which are governed by these rules are (1) Mediation, (2) Non-binding Arbitration, (3) Mini-Trials, (4) Summary Jury Trials, and (5) Private Judges.

. . .

**Rule 1.3. Alternative Dispute Resolution Methods Described**

. . .

**(B) Non-binding Arbitration.** This is a non-binding process in which a neutral third person or a panel, called an arbitrator or an arbitration panel, considers the facts and arguments which are presented by the parties and renders a decision. ~~The decision may be binding or nonbinding.~~ Only non-binding arbitration is governed by these rules.

. . .

**(F) Parenting Coordination.** This is a process described in the Indiana Parenting Time Guidelines, Section V.

. . .

**Rule 1.6. Discretion in Use of Rules**

Except as herein provided, a presiding judge may order any civil or domestic relations proceeding or selected issues in such proceedings referred to mediation, non-binding arbitration or mini-trial. The selection criteria which should be used by the court are defined under these rules. ~~Binding arbitration and a~~ A summary jury trial may be ordered only upon the agreement of the parties as consistent with provisions in these rules which address each method.

. . .

**Rule 1.10. Other Methods of Dispute Resolution**

These rules shall not preclude a court from ordering or parties from agreeing to use any other reasonable method or technique to resolve disputes. A court may order immunity provided by Rule 1.5 herein for the individual conducting other dispute resolution methods ("neutral"), so long as the neutral has communicated the Rule 7.3(A) disclosures and obtained any necessary consent. The parties may agree the neutral shall serve with the immunity provided by Rule 1.5 herein, provided the neutral has communicated the Rule 7.3(A) disclosures and obtained any necessary consent.

. . .

**Rule 2.7. Mediation Procedure**

. . .

**(D) Termination of Mediation.**

(1) The mediator shall terminate or decline mediation whenever the mediator believes:

(a) ~~that of~~ the meditation process would harm or prejudice one or more of the parties or the children;

(b) the ability or willingness of any party to participate meaningfully in mediation is so lacking that a reasonable agreement is unlikely;

(c) due to conflict of interest or bias on the part of the mediator; or

(d) ~~or~~ mediation is inappropriate for other reasons

. . .

**(F) Mediator's Preparation and Filing of Documents in Domestic Relations Cases.**

At the request and with the permission of all parties in a domestic relations case, a Mediator may prepare or assist in the preparation of documents as set forth in this paragraph (F).

The Mediator shall inform an unrepresented party that he or she may have an attorney of his or her choosing (1) be present at the mediation and/or (2) review any documents prepared during the mediation. The Mediator shall also review each document drafted during mediation with any unrepresented parties. During the review the Mediator shall explain to unrepresented parties that they should not view or rely on language in documents prepared by the Mediator as legal advice. When the document(s) are finalized to the parties' and any counsel's satisfaction, and at the request and with the permission of all parties and any counsel, the Mediator may also tender to the court the documents listed below when the mediator's report is filed.

The Mediator may prepare or assist in the preparation of only the following documents:

...

(3) A summary decree of dissolution or legal separation, with the caption in the case, so long as the decree is in the form of a document that has been adopted or accepted by the court in which the document is to be filed and the summary decree reflects the terms of the mediated agreement;

...

Notwithstanding the other provisions of this Rule 2, in matters involving the care, support, and/or assets of children or incapacitated adults, mediated agreements put in writing and signed by all participants may be binding on the participants, but are only enforceable after review and approval by the appropriate court that would have jurisdiction over the care, support, and/or assets of the children or incapacitated adults.

. . .

## RULE 3. NON-BINDING ARBITRATION

### Rule 3.1. Agreement to Arbitrate

At any time fifteen (15) days or more after the period allowed for a peremptory change of venue under Trial Rule 76(B) has expired, the parties may file with the court a request for an order for non-binding arbitration ~~agreement to arbitrate~~ wherein they stipulate ~~whether arbitration is to be binding or nonbinding,~~ whether the ~~agreement~~ arbitration extends to all of the case or ~~is~~ limited ~~as to the~~ issues ~~subject to arbitration~~in the case, and ~~the~~ any agreed upon procedural rules to be followed during the arbitration process. Upon approval, the ~~agreement~~ court shall issue an ~~to arbitrate~~ arbitration order which shall be noted on the Chronological Case Summary of the Case and placed in the Record of Judgments and Orders for the court.

### Rule 3.2. Case Status During Arbitration

During arbitration, the case shall remain on the regular docket and trial calendar of the court. ~~In the event the parties agree to be bound by the arbitration decision on all issues, the case shall be removed from the trial calendar. During arbitration~~ and the court shall remain available to ~~rule and assist in any~~hear and determine discovery or ~~pre-arbitration~~procedural matters ~~or motions~~.

### Rule 3.3. Assignment of Arbitrators

**(A) Arbitrator Selection.** ~~Each court shall maintain a listing of lawyers engaged in the practice of law in the State of Indiana who are willing to serve as arbitrators.~~ Upon assignment of a case to arbitration, the ~~plaintiff and the defendant shall, pursuant to their stipulation, select one or more arbitrators from the court listing or the listing of another court in the state~~parties may select their own arbitrator within fifteen (15) days following assignment subject to approval of the court. If the parties are unable to agree on the arbitrator ~~that the case should be presented to one arbitrator and the parties do not agree on the arbitrator, then,~~ the court shall designate three (3) arbitrators for alternate striking by each side with five (5) days allowed for each side sequentially for striking. The party initiating the lawsuit shall strike first. If the parties agree to an arbitration panel, it shall be limited to three (3) persons. If the parties fail to agree on who should serve as members of the panel, then each side shall select one arbitrator and the court shall select a third. ~~When there is more than one arbitrator, t~~The arbitrators shall select among themselves a Chair of the arbitration panel.

**(B) Arbitrator Compensation.** Unless otherwise agreed ~~between~~ among the parties~~,~~ and the arbitrator(s) selected under this provision, the Court shall set the rate of compensation for the arbitrator(s). Unless otherwise agreed, ~~Costs~~ costs of arbitration ~~are to~~shall be divided equally ~~between~~ among the parties and paid within thirty (30) days after terminating the arbitration ~~evaluation~~, regardless of the outcome.

**(C) Refusal to Serve.** Any arbitrator selected may refuse to serve without showing cause for such refusal.

**Rule 3.4. Arbitration Procedure**

**(A) Notice of Hearing.** Upon accepting the appointment to serve, the arbitrator or the Chair of an arbitration panel shall meet with ~~all~~ the parties or their attorneys of record to set a time and place for an arbitration hearing. (Courts are encouraged to provide the use of facilities on a regular basis during times when use is not anticipated, i.e. jury deliberation room every Friday morning.)

**(B) Submission of Materials.** Unless otherwise agreed, a listing of witnesses and documentary evidence~~all documents the parties desire~~ to be considered in the arbitration process shall be filed with the arbitrator or Chair and exchanged among the parties and all attorneys of record no later than fifteen (15) days prior to any arbitration hearing~~ relating to the matters set forth in the submission~~. The listing of witnesses and documentary evidence shall be binding upon the parties for the purposes of the arbitration hearing only. The listing of witnesses shall designate those to be called in person, by deposition and/or by written report. Documents may include medical records, bills, records, photographs, and other material supporting the claim of a party. ~~In the event of binding arbitration, any party may object to the admissibility of these documentary matters under traditional rules of evidence; however, the parties are encouraged to waive such objections and, unless objection is filed at least five (5) days prior to hearing, objections shall be deemed waived.~~ In addition, no later than five (5) days prior to hearing, each party may file with the arbitrator or Chair a pre-arbitration brief setting forth factual and legal positions as to the issues being arbitrated; if filed, pre-arbitration briefs shall be served upon the opposing party or parties, or their attorneys if the parties are represented. The parties may ~~in their Arbitration Agreement~~agree to alter the filing deadlines. ~~They are encouraged to use the provisions of Indiana's Arbitration Act (IC 34-57-1-1 et seq.) and the Uniform Arbitration Act (IC 34-57-2-1 et seq.) to the extent possible and appropriate under the circumstances.~~

**(C) Discovery.** Rules of discovery shall apply. ~~Thirty (30) days before an arbitration hearing, each party shall file a listing of witnesses and documentary evidence to be considered. The listing of witnesses and documentary evidence shall be binding upon the parties for purposes of the arbitration hearing only. The listing of witnesses shall designate those to be called in person, by deposition and/or by written report.~~

**(D) Hearing.** Traditional rules of evidence ~~need~~ shall not apply to the arbitration process unless agreed to by the parties or otherwise ordered by the court~~ with regard to the presentation of testimony~~. As permitted by the arbitrator(s)~~ or arbitrators~~, witnesses may be called and evidence presented. The parties or their attorneys~~Attorneys~~ may make oral presentation of the facts supporting a party's position and arbitrators are permitted to engage in critical questioning or dialogue with representatives of the parties. ~~In this presentation, the representatives of the respective parties~~Attorneys must be able to substantiate their statements or representations to the arbitrator or arbitrators as required by the Rules of Professional Conduct. The parties may be permitted to demonstrate scars, disfigurement, or other evidence of physical disability. Non-binding arbitration shall be closed to all persons other than the parties of record, their legal representatives, witnesses and other persons invited or permitted by the arbitrator (collectively "participants"). ~~Arbitration proceedings shall not be open to the public.~~

**(E)** ~~**Confidentiality**~~**Admissibility in Subsequent Proceedings.** Arbitration proceedings shall be considered as settlement negotiations as governed by Ind. Evidence Rule 408. For purposes of reference, Evid.R. 408 provides as follows:

. . .

**(F) Arbitration Determination.** Unless otherwise agreed, ~~W~~within twenty (20) days after the arbitration hearing, the arbitrator or Chair shall file a written determination of the arbitration proceeding in the pending litigation and serve a copy of this determination on all parties, or their attorneys, if represented, participating in the arbitration. ~~If the parties had submitted this matter to binding arbitration on all issues, the court shall enter judgment on the determination. If the parties had submitted this matter to binding arbitration on fewer than all issues, the court shall accept the determination as a joint stipulation by the parties and proceed with the litigation. If the parties had submitted the matter to nonbinding arbitration on any or all issues, they~~The parties shall have twenty (20) days from the filing of the written determination to affirmatively reject in writing the arbitration determination. If ~~a nonbinding arbitration~~the determination is not rejected by any of the parties, the determination shall be entered as ~~the~~ a judgment or accepted as a joint stipulation as appropriate. In ~~the~~ such event ~~a nonbinding arbitration determination is rejected,~~ all records of the arbitration hearing, including ~~documentary~~ evidence, briefs, or other materials shall be furnished to the court and included in the case file. In the event the determination is rejected, either by the parties or by the court, all materials furnished by the parties to the arbitrator(s) will be returned to the parties and the determination and all acceptances and rejections shall be sealed and placed in the case file. Notwithstanding the other provisions of this Rule 3, in matters involving the care, support, and/or assets of children or incapacitated adults, arbitration agreements put in writing and signed by all participants may be binding on the participants, but are only enforceable after review and approval by the appropriate court that would have jurisdiction over the care, support, and/or assets of the children or incapacitated adults.

**Rule 3.5. Sanctions**

Upon motion by either party or upon recommendation by the arbitrator(s) and a hearing, the court may impose sanctions against any party or attorney who fails to comply with the arbitration rules, limited to the assessment of arbitration costs and/or attorney fees relevant to the arbitration process.

. . .

**Rule 7.3. Disclosure and Other Communications**

**(A)** A neutral has a continuing duty to communicate with the parties and their attorneys as follows:

. . .

(2) describe the applicable ADR process or, when multiple processes are contemplated, each of the processes, including the possibility in non-binding processes that the neutral may conduct private sessions;

. . .

**Rule 8.6. Settlement Agreement.**

. . .

**(B)** Notwithstanding the other provisions of this Rule 8, in matters involving the care, support, and/or ~~support~~ assets of children or incapacitated adults, mediated agreements put in writing and signed by all participants may be binding on the participants, but are only enforceable after review and approval by the appropriate court that would have jurisdiction over the care, support, and/or ~~support~~ assets of the children or incapacitated adults.

**DISCUSSION:**

Why the change to the rule on arbitration from all arbitrations to non-binding?

Input from **Michael Bishop** as to theses proposed changes:

2.7(F), 3.4(F) and 8.6(B) – these all provide mediated settlement agreements or arbitration awards involving children or incapacitated persons are binding on the parties but only enforceable with court approval. Mediated settlement agreements in estates and trusts also require court approval to be enforceable. See Ind. Code 29-1-9-1 *et. seq.* and 30-4-7-1 *et. seq.*

3.3(B) – provides that unless otherwise agreed, the costs of arbitration shall be divided equally. In commercial and employment arbitration, the arbitrator has the discretion to fee shift.

# ADR Case Law Update

# COA declines to create bright-line rule that evidence of medical bills is never admissible where plaintiff does not seek damages for medical bills; Preserving appellate arguments when mediation evidence is erroneously admitted by trial court

*Gladstone v. West Bend Mutual Insurance Company*, 2021 Ind. App. LEXIS 85 (Ind. Ct. App. Mar. 24, 2021, *trans denied*.

Plaintiff was injured in an automobile accident, suffering injuries which required medical treatment. Tortfeasor's insurer, with consent of Plaintiff's UIM insurer/waiver of subrogation, paid its limits of liability. Plaintiff proceeded to trial against his underinsured motorist carrier. The jury awarded Plaintiff $0.00. Plaintiff appealed, contending the trial court abused its discretion in admitting evidence regarding medical bills and settlement negotiations. The Court of Appeals affirmed the trial court.

Pre-trial Plaintiff sought to exclude evidence of medical billing records arguing Plaintiff was not seeking medical expenses as damages. The UIM sought to include the evidence (including billed amounts and reductions). The trial court sided with West Bend, allowed the admission of billed medical amounts and reductions, and allowed Plaintiff to be questioned about the same (over Plaintiff's objection). The bills were $14,000.00 but had been reduced to just under $2,000.00.

Also at trial, one of UIM insurer's claims specialists testified. When asked if the underinsured carrier had paid anything to Plaintiff for his bodily injuries, the claims specialist testified the carrier had tried to resolve the case and that Plaintiff had refused to accept the offer. Plaintiff's counsel objected to this testimony. After a sidebar between counsel and the judge, Plaintiff's counsel suggested the court declare the claims specialist a hostile witness. The judge agreed that this was an appropriate solution. Plaintiff's counsel did not ask for the judge to admonish the jury to disregard the comments of the claims specialist and did not request a mistrial.

The issues on appeal were whether the trial court abused its discretion in admitting the evidence of paid medical bills/write-downs when Plaintiff opposed the introduction of medical bills altogether; and, whether Plaintiff was entitled to a new trial because of the admission of evidence regarding settlement negotiations?

As to the medical bill evidence the Court noted the countervailing considerations presented by relevancy (Rule of Evidence 401) and probative harm/value (Rule of Evidence 403).

The Court rejected Plaintiff's argument that evidence of medical bills is never relevant to the question of pain and suffering citing "common sense and experience . . . that a more serious injury generally brings with it greater medical expenses as well as greater pain and suffering" as well as a federal trial court case from Montana and a dissent from the Pennsylvania supreme court. The Court summarized the relevancy issue as "If, in the estimation of one of the parties, the amount of medical bills does not accurately reflect the amount of pain and suffering, that party is free to counter it with other evidence and argument, . . . "

With respect to probative harm/value, the Court noted the general bias in favor of admissibility of evidence unless the party seeking exclusion shows the "risk of unfair prejudice substantially outweighs the probative value of the evidence." The Court concluded Plaintiff did not make the requisite showing and stated in a footnote that any failure by the Court in this regard could be harmless (not reversible) error because "[t]he jury heard evidence that Gladstone has already received $50,000.00 from (the tortfeasor), so it is entirely possible that the jury did, in fact, conclude that Gladstone was entitled to recover for his pain and suffering but that he had already been fully compensated." As to this issue, the Court "decline(d) . . . to create a bright-line rule that evidence of medical bills is never admissible in cases where they are not sought . . . "

As to the issue of the admission of evidence of settlement negotiations, the Court agreed with the Plaintiff that the claims specialist's testimony that clearly indicated the Plaintiff had rejected a settlement offer from the Defendant should have been inadmissible pursuant to Rule 408. However, in citing to *Etienne v. State*, 716 N.E.2d 457 (Ind. 1999), the Court noted the proper procedure to correct a circumstance that may warrant a mistrial where inadmissible testimony is admitted is to request an admonishment and/or mistrial. Because the Plaintiff did not request either, the Court concluded Plaintiff had waived the argument Plaintiff was entitled to a new trial.

Thus, the Court affirmed the trial court.

**DISCUSSION:**

Admissibility options with respect to medical bills paid with write-downs and/or gross medical bills:

1. Admit only the gross medical bills (Illinois and Kentucky);

2. Admit both the medical bills paid with the write-downs and the gross medical bills (*Stanley* and *Patchett);*

3. Admit only the gross medical bills, and post-judgment reduce the verdict by the amount of the write-downs (Justice Rucker, *Stanley*);

4. Do not admit either the gross medical bills or the medical bills paid with write-downs if Plaintiff does not seek to recover any medical bills as damages (outcome sought by *Gladstone*)

*Stanley v. Walker*, 906 N.E.2d 852 (Ind. 2009). Rule of Evidence 413 allows medical bill admission as *prima facie* evidence of reasonableness. The collateral source statute found at Ind. Code 34-44-1-2 excludes evidence of benefits plaintiff has paid for and does not allow those benefits to reduce what a plaintiff may recover. The court held, that despite the collateral source statute, evidence of discounted medical bills is admissible so long as insurance is not referenced.

# ADR Case Law Update

*Patchett v. Lee*, 60 N.E.3d 1025 (Ind. 2016). Extended the holding of Stanley to reimbursement by government payors (e.g., HIP or Healthy Indiana Plan).

Since *Stanley* and *Patchett* some Plaintiffs have chosen to not introduce evidence of relatively low amounts of paid medical bills with write-downs to prevent juries from using the same as an anchor for the value of a case. Until *Gladstone,* there was no appellate case addressing this issue. Trial court treatment of this issue has varied [admission where there was a worker's compensation lien – see Ind. Code 34-44-1-2(2); not put into evidence in TBI case with limited medicals].

Impact on cases that plaintiff's counsel will take, negotiation and mediation of cases and trial? Cases with significant injuries but low paid medicals (e.g., Medicare with 4 surgeries); cases where there is no insurance and the bills remain unpaid; significant injury/surgery cases (e.g., knee replacement) with high bills but low paid amounts) . . .

Given standard of review on appeal is abuse of discretion does this help a plaintiff in those cases where the medical bills paid are low (e.g., Medicare) but the injuries may be significant? Will a judge, in those cases, prevent the introduction of evidence of the amounts paid as not being reflective of the treatment received and the nature and extent of the injuries? If so, will a trial judge's decision in this regard stand on appeal given the standard of review is an abuse of discretion?

# Admissibility of Settlement Agreement in further proceedings – Admissibility of documents produced in anticipation of mediation

*Berg v. Berg*, 2021 Ind. LEXIS 409, 2021 WL 2658991 (Ind. Jun. 29, 2021)

Husband and Wife entered into a mediated settlement agreement ("Agreement") as part of the proceedings to dissolve their marriage. At a later date, Wife moved to correct error pursuant to Trial Rule 60(B), alleging that a stock account had been omitted from a balance sheet used at the mediation. Wife attached several exhibits, including balance sheets prepared for the mediation and an affidavit in which Wife alleged that, had she learned of the existence of the account, she would not have agreed to the property disposition in the Agreement. Wife sought to avoid the Agreement by alleging fraud, constructive fraud, misrepresentation, mutual mistake, or other misconduct. Wife alternatively sought to enforce the Agreement by alleging Husband breached a warranty within the Agreement. Husband moved to strike, challenging the admissibility of the evidence attached to Wife's motion as it was evidence of what transpired at mediation.

The trial court relying on the balance sheets and wife's affidavit testimony of what transpired at mediation, found that fraud, constructive fraud, mutual mistake, or misrepresentation had occurred, and that Husband had breached the mutual warranty provision in the mediation settlement agreement. Based on its findings, the trial court awarded Wife half the value of the account. The Court of Appeals reversed concluding the evidence proffered by Wife was inadmissible. The Court of Appeals also held that the Wife was estopped from enforcing the mutual warranty provision in the agreement against Husband

The Indiana Supreme Court granted Wife's petition for transfer and vacated the Court of Appeals opinion.

The Court first addressed the issue of whether documents produced in anticipation of mediation should be excluded from the record pursuant to Rule of Evidence 408. Wife argued the evidence should not be excluded under Rule 408 because the exchange of information regarding the martial assets occurred weeks before the actual mediation session. The Court disagreed with this reading of the rules. Instead, it held the balance sheet and evidence of statements Husband made to facilitate settlement should be excluded as they constituted admissions of fact, which established the "point from which the parties would have negotiated at the mediation itself." The Court reasoned the timing of the admissions of fact did not remove them from exclusion, so long as they were made for the purpose of reaching a settlement agreement.

Next, the Court held the balance sheet was not discoverable outside of settlement negotiations, as the figures on the balance sheet reflected the parties positions as to the value of certain property for the purpose of negotiation. The Court analogized the balance sheet was like the video in *R.R. Donnelley & Sons Co. v. North Texas Steel Co.*, where the Court of Appeals found should have been excluded from the record because it was prepared

and "exchanged in the spirit of attempting to resolve the case through mediation." 752 N.E.2d 112, 128-30 (Ind. Ct. App. 2001). Therefore, the evidence proffered by Wife was not admissible pursuant to Rule 2.11 of the Rules of Alternative Dispute Resolution.

The Court also found that challenging the validity of the mediated agreement was not a collateral matter. Thus, the exception in Rule 408(b) was inapplicable. Rule 408(b) contains an exception that allows the admission of evidence "for another purpose," which Indiana courts have found includes evidence used "in collateral matters unrelated to the dispute that is the subject of the mediation." *See Horner v. Carter*, 981 N.E.2d 1210, 1212 (Ind. 2013). The Court held that, like in *Horner*, Wife sought to change the Agreement itself; therefore, Rule 408 applied, without exception, and Wife's proffered evidence was inadmissible to avoid the mediated agreement.

Finally, the Court returned to the trial court holding and disagreed with the Court of Appeals when it found Wife could enforce the warranty against Husband. Husband had argued, and the Court of Appeals agreed, that Wife was estopped from asserting a breach of the mutual warranty because Wife had also assumed responsibility for the assertions within the warranty, which proved to be untrue. The Court determined such a conclusion would render the warranty meaningless holding the warranty could be enforced, as the parties had warranted "one to the other" that the assets were accurate.

Although Wife's evidence was not admissible to challenge the validity of the mediated agreement the evidence was held admissible in the collateral action to enforce the agreement and that the trial court had not abused its discretion in determining Husband breached the mediated settlement agreement. The Court, thus, upheld the trial court's award of half of the stock account to Wife.

In practical and ethical terms this case raises issues. As the dissent to the Court of Appeals opinion pointed out there were no less than 10 exhibits showing discussions and communications in anticipation of mediation that included the stock account. With this evidence, I wonder why the courts on appeal did not resort to an analysis like that found in *Fire Ins. Exchange v. Bell*, 643 N.E.2d 310 (Ind. 1994). The "principal issue" identified by the Indiana supreme court in *Bell* was "whether and to what extent a party who is represented by counsel has the right to rely on a representation by opposing counsel during settlement negotiations." During settlement negotiations counsel for the defense allegedly misrepresented in writing the limits of liability of an applicable homeowner's policy of insurance to be $100,000 rather than $300,000. The defense unsuccessfully argued counsel for the claimant had no right to rely on the representation given opposing counsel was a "trained professional involved in adversarial settlement negotiations and had access to the relevant facts."

Is *Bell* distinguishable because opposing counsel's act was one of commission as opposed to omission? Do you think any of the courts (trial, appellate and supreme) considered possible legal malpractice ramifications in making their decisions?

So how far back may the confidentiality found in ADR Rule 2.11 reach?

If the Husband's counsel made the mediator aware the stock fund had been omitted by Wife's counsel, then should the mediator consider whether an agreement omitting the fund was a prejudicial one under ADR Rule 2.7(D)(1)(a)?

# Enforceability of Arbitration Agreement – agency and equitable estoppel theories

*Doe v. Carmel Operator, LLC*, 160 N.E.3d 518 (Ind. 2021)

The legal guardian of an elderly woman living in a senior living community brought a complaint against the community, the community's management company, one of the community's employees, and the community's employee screening company alleging sexual assault of the elderly resident, vicarious liability, and negligence.

Both the community screening companies demanded the guardian arbitrate her claims pursuant to an arbitration agreement executed by the guardian and the community. Guardian objected to arbitration. The trial court granted the community and screening company's motions to compel arbitration. While the screening company was not a signatory to the agreement, the trial court found that the company could enforce the arbitration agreement based on an agency theory and two alternative theories of equitable estoppel. The Court of Appeals affirmed the trial court. The Indiana Supreme Court granted transfer to address whether the screening company can compel arbitration against the guardian. On all other points, the Supreme Court affirmed the lower court decisions.

The screening company argued that it could enforce the arbitration agreement because, as the agent of the community, it was an intended third-party beneficiary of the agreement. The screening company also argued that equitable estoppel applied. The Supreme Court disagreed.

First, while the Supreme Court agreed that an agent was an intended third-party beneficiary of the arbitration agreement, the Supreme Court held that the relationship between the community and the screening company was that of an independent contractor, not an agent. Therefore, the screening company could not enforce the arbitration agreement because of its relationship to the community.

Second, the screening company argued that equitable estoppel should apply to stop the guardian from acting to the screening company's detriment. The Supreme Court identified the three essential elements of equitable estoppel: the party claiming estoppel must (1) lack knowledge and the means of knowledge as to the facts in question; (2) rely upon the conduct of the party to be estopped; and (3) experience a prejudicial change in position based on the conduct of the party to be estopped. Because there was no evidence in the record that the screening company knew of or relied upon the arbitration agreement and no evidence that the screening company experienced any sort of detriment because of its non-existent reliance, the Supreme Court held that the screening company could not avail itself of equitable estoppel. The Supreme Court also declined to endorse the alternative theories of equitable estoppel previously adopted by the Court of Appeals and disapproved of the Court of Appeals decision in *German American Financial Advisors & Trust Co. v. Reed*, 969 N.E.2d 621 (Ind. Ct. App. 2012).

Thus, the Supreme Court held that the screening company could not compel the guardian to arbitrate her claims and reversed the trial court's decision on that matter.

# Enforceability of Arbitration Agreement – medical malpractice claims

*Estate of King v. Aperion Care*, 155 N.E.3d 1193 (Ind. Ct. App. 2020), *reh'g denied*, *trans. denied.*

The Estate of Sandra King initially filed a proposed complaint against defendant with the IDOI alleging medical malpractice. During discovery but before the matter had been submitted to a medical review panel, the Estate learned Defendant and King had signed an arbitration agreement, which stated that all claims against Defendant were to be resolved exclusively by arbitration. Based on this agreement, the Estate moved to compel arbitration; however, the trial court denied the motion holding the case was not ripe for arbitration because the Estate's claims must first go through the review process set forth in the Indiana Medical Malpractice Act (the "Act").

The Estate appealed, arguing the trial court erred by denying the motion to compel arbitration. The Court of Appeals agreed with the Estate and reversed the trial court.

The arbitration agreement at issue (drafted by defendant) included expansive language requiring any legal claim against Defendant to be resolved exclusively by arbitration. Based on the parties' agreement that arbitration shall be the exclusive means for resolving any claim and Indiana precedent which calls for "every doubt to be resolved in favor of arbitration," the Court concluded Defendant had relinquished its right to avail itself of the Act. The Court also cited to a footnote contained in a prior case warning that this outcome could occur under these facts.

The Court did note the parties could have, although they did not here, agreed as a condition precedent to arbitration that any issue falling under the Act must be presented to a medical review panel prior to proceeding to arbitration.

The Court reversed and remanded the matter to the trial court with an instruction to grant the Estate's motion to compel arbitration.

Accomplish môre.

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# Section Four

# ZOOMING INTO THE FUTURE: THE FUTURE OF THE MEDIATION PRACTICE

## ICLEF ADVANCED MEDIATION

**July 2021**

**Michael P. Bishop**
**Cohen Garelick and Glazier**
**8888 Keystone Crossing, Suite 800**
**Indianapolis, IN 46240**
**Phone: (317) 573-8888**
**Fax: (317) 574-3855**
**mbishop@cgglawfirm.com**

## Section Four

## Zooming Into the Future: The Future of the Mediation Practice……Michael P. Bishop

THE NATIONAL ACADEMY OF DISTINGUISHED NEUTRALS

# Virtual Hearings and Mediations Are Here to Stay

## JAMS

**USA** May 20 2021

As the COVID-19 pandemic recedes, every aspect of our pre-pandemic ways of work is under review. Simply returning to our old ways is not the answer. To do so is to ignore the lessons learned while working remotely. Dispute resolution, like almost every aspect of society, changed as a consequence of the pandemic and what will remain is the extensive use of video. Why because it is less costly, efficient and effective.

COVID-19 thrust the legal community to work online. To the surprise of many lawyers, mediators, arbitrators and judges, the work continued to get done. Virtual hearings and mediations proved to be so successful that they are here to stay.

At the outset, one obstacle to conducting virtual hearings was learning how to operate in a virtual world, such as how to sign on to a virtual platform, upload and access documents and move participants between "rooms." Security measures were enhanced to provide access only to the designated participants. In contested hearings, protocols were developed to preclude real time coaching of witnesses. Finally, adoption was slow until it became obvious that virtual hearings were essential to resolve disputes. Like riding a bike, once you learn, you do not forget.

What drove the acceptance was need. Courts were effectively closed for public hearings, and the convening of a jury was a rare event. The only way to address a legal dispute was virtually. Increasingly, legal professionals learned that the work could get done in a more efficient manner. For example, travel ceased to be an issue, which reduced costs and facilitated scheduling. Documents could be sent electronically to anyone at any time. Witnesses no longer had to sit and wait to be called; a simple text message could alert them when to sign on. Breakout rooms allowed parties and counsel to caucus in their own cyber room. Given that this process was not business as usual, lawyers learned to cooperate in scheduling and related aspects of a hearing.

However, there are lingering limitations. In mediations, personal contact can be critical in the final stages of a negotiation. The impromptu hallway conversations do not exist. Participants can simply sign off in frustration, and there is no opportunity to stop them at the elevator door. Distractions at participants' locations can divert their attention, and participants are no longer sequestered in a single room mulling over the issues.

In-person contested hearings make it easier for the arbitrator to manage all the participants. Everything that is before a witness can be seen. The interactions between counsel and client are observable, which may not be the case in a virtual hearing. As a consequence, there is a perception that assessing credibility is enhanced by in person proceedings. An article by Judge Wayne Brazil, "Credibility Concerns About Virtual Arbitration Are Unfounded," demonstrates that is not the case.

There are benefits of in-person proceedings, but I believe they are marginal in the overwhelming number of matters. The concerns about credibility or presenting evidence in a virtual hearing have not been borne out. The efficiencies of virtual hearings have driven their acceptance and continued use.

**JAMS** - Hon. Patrick J. Mahoney (Ret.)

# The Era Of Video Mediation Is Here — Or Is It?

By **Jeff Kichaven**

Jeff Kichaven

Mediators are selling online video mediation these days. The evidence is in every litigator's social media feed and email inbox.

But are litigators buying? The evidence is not clear.

To determine demand for online video mediation, I conducted an informal email survey of over 200 first-chair business trial lawyers and senior claims executives from around the country, many of whom have been my mediation clients. I received email replies from nearly 100, and had telephone conversations with 20 or so. Very few have experienced a video mediation. By a margin of about 4-to-1, respondents are reluctant to adopt this new technology. But most are willing to keep the option open.

Here's a typical response, from Jeff Charlston of Los Angeles' Charlston Revich & Wollitz LLP: "I would be reluctant to participate in other than a face-to-face mediation because, rightly or wrongly, I would not expect a video mediation to have as high a success rate as a mediation where all necessary parties are present."

Many, such as Jim Holmes of Clyde & Co. LLP in Los Angeles, are reluctant because they believe they can observe more nuance and detail in person: "There's something about being able to see others to judge reactions, credibility and limits; the personal touch. Nothing quite equals face-to-face to detect other messages."

Or, in more unvarnished terms from another respondent, whose name is withheld for obvious reasons: "I hate video mediations. For a litigator, there's something about eyeballing your opponent and their client in order to read body language, gauge perspiration level, observe twitching, and being able to smell their fear."

This reluctance is grounded in reality. Online video mediation is, in general, just not as good.

The Harvard Law School Program on Negotiation reported this on March 26:

> Negotiation thrives on physical presence. Handshakes, eye contact, shared meals, and long meetings in stuffy conference rooms are everyday tools of the trade, and with good reason: Negotiators who meet in person reach better deals than those who negotiate online, research shows. Face-to-face meetings offer invaluable nonverbal and verbal cues, such as eye contact, body language, and tone of voice, that facilitate understanding and build lasting bonds.[1]

The research cited does not really support the author's conclusion. That research involved only a comparison between face-to-face negotiation and negotiation via email. Even so, the experience of the real world shows the conclusion to be sound.

Most promotions for video mediation involve Zoom. Zoom is hardly a new technology. Zoom's Wikipedia page states that the service began in January 2013.[2] In February 2015, the number of people using Zoom meetings reached 40 million. Yet until last month, nobody talked about Zoom as a viable platform for mediation (though some writers had for years

touted various versions of online dispute resolution).

As Steven Brower of Orange County's Brower Law Group phrased it, "If Zoom was such a good way to do a mediation, we would have been using it long ago." More colloquially, we all know that if you build a better mousetrap, the world will beat a path to your door. But no mediator, or litigator, was beating a path to Zoom's door for mediation until last month, despite Zoom's ubiquity. Ergo, it must not be that better mousetrap.

Respondents familiar with videoconferencing confirmed video mediation's shortcomings.

As Sheldon Eisenberg, Los Angeles office leader at Faegre Drinker Biddle & Reath LLP put it: "I believe that [a video mediation] would negatively impact my ability to interact with and appropriately read my client. I often see it on videoconferences inside and outside of my law firm. The conversations can be more stilted, there is more reluctance to speak when you cannot clearly see the listeners' reactions, and you lose the ability to read body language and the details of facial expressions. The result is impacted communication."

In more candid moments, many mediators agree. Here's what one prominent mediator, who asked to remain anonymous, said after his first video mediation: "The lawyers seemed harder to read while the litigating parties themselves seemed a bit out of it."

So, don't expect litigators to flock to video mediations. Until they need to. And for at least a little while, they don't.

As Justin Kudler of AXA XL in Connecticut put it to me, the number of cases that need mediation is a subset of the number of cases that need to be settled. What catalyzes settlement better than anything else, though, is a looming trial date. And trial dates all across the country have been vacated for weeks or months to come.

Howard Wollitz of Charlston Revich described the effect of this: "I do not anticipate significant demand for video mediation. The reality is that many mediations get scheduled only as trial dates approach. Trials are being put off by the courts, so I think mediation scheduling will be pushed off as well."

This is confirmed by conversations with mediator colleagues all over the country, as well as my own experience. Previously scheduled mediations are dropping out faster than presidential candidates after Super Tuesday.

The ability to avoid settling and mediating will not last long, though. COVID-19 is filling everyone's lives with new challenges, many of which will become disputes and ultimately lawsuits. To make room for these, clients and lawyers will have to put many of their current lawsuits to rest. So even without trial dates looming or expensive discovery impending, clients' business and personal needs will impel them to pay a little more, or take a little less, to put shopworn disputes behind them. In hard-to-settle cases, people will still need mediators to help them.

With shelter-in-place orders in effect, though, face-to-face mediations will be impossible. So, just as many first-chairs were dragged kicking and screaming to mediation 25 years ago, their son and daughter first-chairs will be dragged to video mediation today — or in 30 days or 60 or 90. Some will love it. Some will adjust grudgingly. Still others won't find it their cup of tea.

Two conclusions seem obvious.

1. Video mediation is here to stay. Or at least, it's not about to disappear. Mediation will come to be considered in every case, just as face-to-face mediation came to be considered in every case 25 years ago.

2. Video mediation will not become a one-size-fits-all solution. Indeed, nothing in mediation should be one-size-fits-all. Lawyers will have to decide on a case-by-case basis whether a particular mediation should proceed face-to-face or online. Video is a tool that will sometimes be right for the task, sometimes not.

Stanford University scholar Thomas Sowell famously wrote, "There are no solutions, only tradeoffs." Let's therefore consider a few of the tradeoffs in deciding whether video mediation is the best choice in a given case.

**The Obvious Plus: Cost**

Commercial mediations increasingly require many people from many places to participate. Travel to the mediation site can be a challenge. A one-day mediation can be a three-day enterprise, with a day to get there, a day to mediate, and a day to get back. That's expensive.

With a video mediation, time and travel costs are saved. And as a corollary, when we are looking at a one-day commitment rather than three, we can schedule mediations on much shorter notice. These benefits can be significant.

**The Surprising Minus: Lack of Teamwork**

Many respondents believe that physical separation from their clients in video mediations will diminish the quality of brainstorming and negotiation.

Here's one typical comment, from a prominent litigator in Chicago, who asked that her name be withheld: "My clients take some comfort with me sitting next to them. We are more in it together when we are together physically as a team and can whisper and signal things to each other. Relatedly, I would be less likely to go out on a limb on video, in a way that might be productive, without my client sitting next to me."

This lack of teamwork can extend beyond the formal aspects of the negotiation.

Ray Gallo of Gallo LLP described face-to-face mediation as the best client relations tool since golf: "There's also value in the lawyers being physically with their clients, telling stories, talking about the case, talking about personal things, and connecting. That personally present connection can't happen remotely."

While these minuses are hard to quantify, it's hard to deny that they are real.

**The Obvious and Surprising Wild Card: Partial Attention**

Not surprisingly, many respondents value the focus of an all-day, face-to-face mediation as a catalyst to settlement.

Gallo continued: "Mediation works in part because everybody has made a significant commitment to getting a deal by showing up, participating and being there (hopefully) late to get it done. In fact, the longer people stay, the more likely a deal is, psychologically, as

people are more invested. That physical investment can't happen remotely."

Building upon this, an insurance coverage litigator in Los Angeles, who asked that his name be withheld, viewed the negative impact on negotiation in these terms: "[In a video mediation,] it is too easy to pull the plug on a session. And, for the times when walking out of a mediation is necessary to send a much-needed message, there isn't the impact."

Here's how Cyndie Chang of Duane Morris LLP in Los Angeles phrased it: "There's just something magical that happens when you can look someone in the eye or when you make clients travel and appear to attend a mediation, which is disruptive to their normal routines. In contrast, remote working situations are full of distraction and may impair the focus of the participants in the mediation."

To other respondents, though, the possibility of partial attention at a video mediation is a plus. Some lawyers commented that they would welcome the ease of turning to other work when the mediator was not with them.

And, we often bemoan the physical absence from the mediation of "the real decision-maker for the other side." It may prove easier to get "the real decision-maker" (generally a very busy person) to participate if we can promise that decision-maker an easier ability to get other work done during the mediation day.

Plus, we mustn't forget that even at a face-to-face mediation, partial attention is all we get.

As Sam Lewis of Cozen O'Connor in Miami put it: "Let's face it, it is common for parties to set up in separate rooms, to have access to email and the web, and just about everybody has a smartphone. Thus, we're already at a point where parties can use time to deal with other work and other clients."

Still, there is a real concern. Success in mediation depends on people getting second thoughts. But getting second thoughts about a subject presupposes that one is having thoughts about a subject at all. If distractions cause one's thoughts about the mediation to fall below some threshold, there will be a price in brainstorming, creativity, epiphanies.

Lawyers must weigh these trade-offs, and more, on a case-by-case basis, when they decide whether the benefits of a video mediation outweigh the costs.

Finally, we must face the fact that this may all look very different very soon. One Chicago litigator, who asked that his name be withheld, told me, "The firm is operating at a level of technological sophistication unimaginable even one month ago." Who knows whether reluctance to use video for mediations will melt away as the technological sophistication of lawyers continues, out of necessity, to accelerate.

I wonder whether our concerns about online mediation will, sooner or later, seem of a piece with these early reactions to another technological innovation:

> On March 10, 1876, a new invention sent an invisible electrical signal through a pair of copper wires. On the other end of those wires, the signal was converted to sound waves and Alexander Graham Bell's assistant heard the now-famous words: "Watson — come here — I want to see you."
>
> Later that same year, across the Atlantic, the chief engineer at the British Post Office boldly claimed that "The Americans have need for the telephone, but we do not. We

have plenty of messenger boys."

Meanwhile, over in America, the President of the Western Union Telegraph Company asserted that "This 'telephone' has too many shortcomings to be seriously considered as a means of communication."[3]

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*Jeff Kichaven is an independent mediator with a nationwide practice. He specializes in insurance, intellectual property and professional liability matters.*

*Disclosure: Chang, Brower, Eisenberg, Gallo, Holmes, Lewis and Wollitz, quoted above, have been Kichaven's mediation clients over the years.*



[1] Katie Shonk, Online Negotiation in a Time of Social Distance, https://www.pon.harvard.edu/daily/negotiation-skills-daily/online-negotiation-in-a-time-of-social-distance/, March 26, 2020.

[2] https://en.wikipedia.org/wiki/Zoom_Video_Communications.

[3] Melis, "Bitcoin critics are on the wrong side of history," https://medium.com/@melis.io/bitcoin-skeptics-are-on-the-wrong-side-of-history-a61899f4c355.

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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

# Credibility Concerns About Virtual Arbitration Are Unfounded

By **Wayne Brazil** (May 26, 2020, 5:23 PM EDT)

Wayne Brazil

The COVID-19 pandemic is forcing a stressed legal community to assess the pros and cons of conducting arbitrations by videoconference. Lawyers or arbitrators who suggest conducting hearings by videoconference are getting a lot of pushback — much of which is rooted in fear that videoconferencing will compromise an arbitrator's ability to reliably resolve credibility contests.

I think this fear is misplaced. Why?

Thoughts about three related questions inform my view: (1) how many cases really "turn on credibility," (2) what does "credibility" mean in our legal world, and (3) how do arbitrators actually make credibility determinations?

Before addressing these questions, it is critical to bear in mind that when an arbitrator watches a witness testify on a large video screen, the arbitrator is still watching the witness testify. The witness's face is still in front of us. We can see expressions change, eyes dart, heads turn to the side to search for signals from counsel or a co-party, or heads bend down to search a document for an answer.

We can see initial reactions to questions, reluctance to respond, indirection, indecision, circularity, obfuscation — as well as forthright, straight-on answering (which, we've learned, sometimes can pose the greatest threat to making accurate findings).

Given these facts of videoconferencing life, the real question is this: How much is an arbitrator's ability to assess credibility compromised, really, when he or she watches a witness testify, live, on a big screen, instead of watching the witness testify a few yards away in person?

To address this question, we begin by asking how many cases actually turn on credibility? Are we prone to exaggerating the number?

Experienced judges and arbitrators know that the outcome of relatively few cases of any complexity is dependent on whether the arbitrator believes the testimony of any given witness at the time that testimony is given. While we (just like everyone else) form general impressions of people who are testifying before us, we also know that our powers of psychic divination are, shall we say, limited.

Self-aware arbitrators know they are not particularly good at looking into other people's hearts or minds

as they speak. And many of us have been guinea pigs in experiments by sophisticated psychologists and psychiatrists that have proven how difficult it is for experienced judges and lawyers to tell whether people are lying just by watching the way they perform verbally.

Moreover, in many cases the evidence with the most probative muscle is data-based or documentary — prices, units, inventory, components (compared or standing alone), source codes, log books or contemporaneous notes, letters, emails, specific provisions or words in contracts or the absence of provisions or specific words in contracts, etc.

To dig deeper, however, we must turn to the closely related remaining two questions we posed at the outset: What does the word "credibility" mean in the legal world and how do arbitrators actually go about assessing or measuring the credibility of testimony.

What is "credibility" anyway?

Some people think that credibility is a synonym for truthfulness, and that determining the relative credibility of witnesses is a simple, binary task of deciding who is telling the truth and who is lying. For many reasons, this view is mistaken.

First, this view assumes that "truthfulness" is a simple moral and empirical concept. In fact, truthfulness is much more complicated.

People can be truthful in their hearts, meaning that what they say is what they really believe, but their truth can be based on assumptions, ideas, experiences or emotions that other people do not share. One person's truth can be sincerely based on an individuated mental or psychological platform from which he or she draws inferences and records perceptions.

But another person, working from a different platform, might see the same truth (even the same single event) quite differently. In other words, human truth is, literally, not an absolute, permanently cast thing out there. It can be elusive, mobile and variable with the angle of perception. Like the real world as modern physics has taught us to understand it.

Second, there is a huge difference between lying and accuracy. A witness who is not lying, who has no intention of lying and feels no reason to lie, can simply be "wrong" — meaning (for this purpose) that most people, even working from a variety of platforms, would not agree that how the witness recounted an occurrence was how it actually occurred.

Memory is notoriously fallible, which means that a witness with the purest of hearts can testify truthfully — but inaccurately — as a result of an imperfect memory.

Perception also is notoriously fallible — and individuated. It has been shown, famously, that people in different cultures actually "see" different colors when looking at the same swath. And we all know how reliable eyewitness testimony has been shown to be.

Testimony is the product of memory and perception working in combination — thus increasing considerably the risk of honest error.

The law adds another layer of necessary complexity to this situation. In the legal world, objective facts sometimes actually are artificial mental constructs necessarily built by judges or arbitrators at the end of

a long process.

"Findings of fact" are what we call these constructs. They are the labels we attach to the ultimate products of a process that requires consideration and assessment of a very large number of variables.

A finding that one witness's testimony about one event or communication is more "credible" than another witness's testimony about the same event or communication is an example of such an artificial construct. It is a legal product whose creation is mandated by the need to close a dispute. It is not an assertion by the trier of fact that she is sure she knows what actually happened.

This is a very important point for lawyers and clients who are trying to determine how much they might be risking by agreeing to participate in a hearing remotely, rather than in person.

How do arbitrators go about constructing this kind of a legal product?

Good arbitrators do not begin the process of making findings of fact until everything is over — until all the witnesses have been examined and cross-examined, all the documents have been admitted and studied, all the arguments have been heard and recorded, all the post-hearing briefings have been completed and digested.

It is not until this point that the arbitrator begins the journey toward making findings. And this journey is not over a simple linear route. Rather, the arbitrator constructs (often in the form of an outline) a comprehensive comprehension of all the evidence and argument, then begins systematically assessing relationships between all the testimonial evidence and all the documentary evidence, looking for consistencies, plausibilities, and narratives that square with experience — and trying to identify the testimony that does not fit as well into the comprehensive context as other testimony.

It is in this kind of context-dense and content-dense setting that an arbitrator decides which versions of events are more credible than other versions of those same events.

Stated differently, when an arbitrator must decide whether a testimonial statement is more likely accurate than not, he or she takes systematically into account a host of considerations: (1) the relationship between the content of the testimony and the content of other evidence, especially documentary evidence that was generated close in time to the disputed event and under well-established habits or practices, or in the normal course of business for an independent reason, (2) the clarity and quality of all of the other testimony by the witness, (3) the internal consistency and coherence of the testimony, (4) its conformity with common experience or with what would be commonly expected in the circumstances, (5) the age of the perceptions, (6) motives, (7) perspectives, (8) capacities — the list goes on. No single factor controls.

Nota bene: the witness's appearance while testifying, and the manner in which the examination or cross-examination was conducted, either fall off the analytical grid or fade into relative insignificance.

It follows that whether the witness delivers his or her testimony six feet from the arbitrator or via satellite makes virtually no difference.

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*Wayne D. Brazil is a neutral at JAMS and a former judge in the U.S. District Court for the Northern District of California.*

Alternatives
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ADR Practice

# The Decline of Dialogue: The Rise of Caucus-Only Mediation And the Disappearance of the Joint Session

BY ERIC GALTON, LELA LOVE & JERRY WEISS

It had been a very painful dispute and then lawsuit. Now a mediation was ahead. The inside counsel to a large shipping company enjoyed the train ride to Boston from New York City, filled with the expectation that an emotionally wrenching, vicious and troubling conflict might get resolved in mediation.

Two years earlier, a ship had been sunk because the ballast was improperly distributed; in a rough sea, the ship listed to one side and went down. From the company's perspective, the ballast and the safety of the ship were part of the captain's responsibility. No punitive action was taken against the captain, however, despite the enormous loss. The captain at the time of the incident was a well-liked long-term employee.

One year earlier, in a move to downsize, the company let the captain go. The captain filed suit for age discrimination, naming not only the company but several decision-makers as defendants and making a seven-figure demand. The company wanted to pay nothing as the contract between the captain and the company was at will and the previous ship loss made the captain's claim seem preposterous.

Company executives knew that the captain had become extremely depressed, given the loss of his long-time employment. Altogether, it was an expensive and unhappy end to what had been a good run for all involved.

Now, on the train ride north, the inside counsel was hoping that the company could explain the decision to let the captain go and restore some of the captain's self-esteem. Possibly, a deal could be struck to give the captain part-time employment. He also was hoping that the captain might come to better understand that there was a significant emotional component as far as the company and its executives were concerned, and that none of them viewed themselves as the "legal wrongdoers" articulated in the complaint. The inside counsel was hoping for a win-win outcome.

An all-day mediation ensued. The company executives and the captain did not meet face-to-face at any point—the parties were kept in separate caucus rooms. An outside firm did all the distributive bargaining—trading of numbers—for the company, and the plaintiff's attorney spoke for the captain. Because the numbers were too far apart, no monetary settlement ensued. The mediator went back and forth, telling one side they should offer more, and the other side, they should accept less.

The result was that the company representatives thought the captain was crazy with respect to his settlement offers, and were frustrated that their own regard for the captain was never part of the conversation. The captain felt all the more disrespected and sidelined by the mediation process.

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The authors are veteran mediators and conflict resolution academics and educators. Galton is a full-time mediator based at Lakeside Mediation Center in Austin, Texas. Love is a professor of law and director of the Kukin Program for Conflict Resolution at New York's Benjamin N. Cardozo School of Law. Weiss, also a full-time mediator, is founder of MediationInc, based in Shaker Heights, Ohio.

## ADR Process Design

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tion into their business models even as the world slowly returns to a new normalcy. Why would they make an exception for inherently expensive arbitration?

At most, perhaps some may take things a step at a time, barring virtual proceedings absent affirmative consent which can be exercised in whole or in part in the context of an actual dispute. But the price of such a reservation is that the counterparty retains the same veto right, thereby potentially precluding virtual proceedings even if one side does not object.

### Human and Practical Factors

While advances in technology and logistics now address most nuances of ensuring a fair virtual process and will continue to evolve, they do not address the more human and interpersonal dynamics lost to a virtual forum. With virtual proceedings now firmly entrenched at least in hybrid form, panels and practitioners will need to focus heavily on how to replace these intangibles, including in the following respects.

*Collegiality.* Panel members have historically interacted in person during the course of hearings—including not simply conferences but likely meals and socializing—thereby fostering collegiality instrumental to forging a consensus. In a virtual setting, panelists may need to find other ways to gain that same interpersonal dynamic. Certainly, additional pre-meetings and panel conferences may help to fill the void, but panelists will need to be sensitive to building rapport in a purely remote atmosphere, especially if they have no track record together.

*Team Bonding.* Litigants also inherently form bonds and cultivate their newer attorneys in the context of waging battles in courtrooms or in-person arbitral hearings. Teams are cloistered in war rooms, dine together, and spend innumerable hours interacting. If they participate in a dispersed manner from different remote locations, that intangible process dissipates. Perhaps respective teams engaged in a virtual arbitration can nevertheless assemble themselves in one place at least to maintain their own sense of camaraderie and nurturing, whether the work efficiency also benefits.

*Zoom Fatigue.* Everyone sooner or later may suffer from Zoom fatigue. Panels should stay alert to the need for breaks and even adjournments to maintain the sharp quality of a proceeding. Parties and their counsel should not be shy to raise the issue if they feel beleaguered, or if they perceive that the panel's attention is lapsing.

*Document Management.* There are some aspects of arbitration that may simply be more cumbersome in a virtual setting. Handling tomes of documents and exhibits electronically may be daunting for panel members, particularly those less adept with technology. All participants should therefore seek to streamline proceedings and facilitate efficient focus on what matters. Joint binders of core documents and a consensus time line of events, for example, would obviate the need to search and distill computerized repositories.

*Physical Evidence and Movement.* There are obvious practical limitations when participants are not in the same room. If physical evidence is involved, it cannot be manipulated remotely. Lawyers cannot approach witnesses or the panel for emphasis, and spontaneous movement or attention-getting gambits for whatever purpose become impossible. See Jennifer Gibbs, "Virtual Litigation May Unravel the Narcissistic Lawyer," *Law360* (available at https://bit.ly/3cYoKFD). Participants in a virtual proceeding must think through in advance how they will accomplish mechanical aspects that were second nature in the context of an in-person setting. Courts and bar associations will no doubt set decorum standards as the virtual versions of such mannerisms evolve.

* * *

Few would disagree after more than a year of virtual arbitration that it is here to stay in some way, shape or form. As time marches on inexorably, and younger generations bred with technology rise in the legal and arbitrator ranks, resistance to a virtual process will inevitably diminish and wrinkles will be fine-tuned. Until then, all arbitration participants should recognize that they are in an evolving environment and be open and receptive to making the process amenable and efficient.

## ADR Practice

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Nothing good was accomplished. Even if a settlement had been brokered and a number reached, the captain would end his career embittered. The company employees, who had shared a world of experience with the captain, would be distressed too. There was no dialogue between the key parties.

* * *

In the legal world, mediation is—or has been—the bastion of dialogue and collaborative problem solving. Building understanding. Creating win-win solutions. Searching for and identifying underlying and non-monetary interests.

Mediation trainers have followed models that promote using joint sessions where dialogue and understanding is fostered or at least possible—a joint session comprising something more than perfunctory meetings and greetings. Mediation aspires to be a fulsome, managed discourse where listening is elevated over talking and better understanding and clarity are advanced over "winning" or making someone lose.

In short and in its most virtuous format, the joint session is a learning conversation unlike the binary narrative of a courtroom opening or closing argument, and no matter where it might find its place in the mediation, whether at the beginning, middle or end.

This contrasts with the adjudicative processes of arbitration and litigation. Or even the evaluative processes of neutral expert evaluation or evaluative mediation. In adjudicative and evaluative processes, the parties fight with each other to get the neutral on their side and get a favorable decision or opinion—or helpful advocacy—from the neutral. No fostering of dialogue or building understanding between parties is targeted.

Now this bastion of dialogue and human connection is being challenged in an era when dialogue generally is declining due to a variety of factors—political, cultural, and professional. A proper treatment of these factors is too complex for this article, but we elaborate on a few.

Professionals must be fast. They rely more and more on distracting and self-absorbing technologies, which promote efficiencies but alienate users from human contact. Additionally, the emotional avoidance inherent in many professionals, particularly attorneys, and a tendency toward their dominant adversarial paradigm, lends itself for lawyers to an increasing inclination away from the "relational" and toward the "transactional."

What better than operating from your own private caucus room and not having messy engagements with opposing clients and their argumentative attorneys?

An additional challenge is the Covid-19 pandemic and the migration of mediation to the Zoom platform. The changes to mediation wrought by taking it online will no doubt influence post-pandemic mediations.

The joint session, however, whether the mediation is virtual or not, should remain a viable mediation feature, with the virtual platform providing both challenges and benefits with respect to its use.

Ironically, the joint session was the primary reason parties would appear in person for mediation. Hence, the gradual extinction of the joint session may result in more virtual mediations and fewer in-person mediations post-pandemic.

## Inability to Dialogue

A recent survey of the use of joint session and caucus, developed by this article's authors, finds a trend among some of the most formidable mediators in the world using more and more caucusing, and caucus-only formats.

[The Survey on the Use of Joint Session and Caucus was developed in 2019 by co-authors Lela Love, Jerome Weiss, and Eric Galton, with the participation of 129 mediators from the International Academy of Mediators (IAM). The authors gratefully acknowledge the helpful comments of University of Indiana Prof. Lisa Blomgren Amsler in the preparation of the survey. The authors also thank Cardozo student Krysta Hartley for her tireless and expert work on the survey.]

In our political arena, we witness the inability of Republicans and Democrats to have meaningful dialogues or to tackle and solve tough problems together. "No Talk" lines are drawn between one candidate's supporters and their opposite counterparts. Silos are dangerous for democracy.

And mediation without dialogue—or joint sessions—between parties is perhaps as regrettable a devolution. Or, the trajectory of mediation may be mirroring a fractured, polarized society where conversation is perceived as awkward, if not dangerous.

If you are thinking that there are some cases where parties are too traumatized to speak to their abusers—in employment or sexual harassment cases, for example—you are correct that caucus has an important role. Describing one's harm to those who have caused the harm, however, and having and bestowing the power of forgiveness are powerful healing mechanisms.

Seeing real people in real life is important. Allowing parties to hear something from the "horse's mouth" may allow a more human, albeit difficult, connection and an opportunity to appraise important facets such as credibility and relatability.

And the importance of such "human connection" may not only be confined to conflicts such as family, employment, or personal injury disputes. Even in the driest of commercial and business disputes, the model of collaborative problem-solving yields a less contentious and more satisfying and durable outcome.

When parties collaborate the product tends to be more durable, and their newfound relationship may lead to avoiding future conflict.

Recent research on the use of caucusing by mediators and resulting outcomes suggests that caucusing does not have advantages we might expect. A study suggests that caucusing during mediation has, with perhaps some exceptions, no effect on the settlement rate. See the American Bar Association Section on Dispute Resolution Task Force on Research on Mediator Techniques (adopted by the Section's Council in 2017) (available at https://bit.ly/3khdRAZ).

This study reviewed 47 studies with empirical data to examine the effects of mediator actions and styles on outcomes—one of the actions was caucusing. An exception in the Task Force review was that there was increased settlement with caucusing in labor-management disputes. See also, Roselle Wissler & Gary Weiner, How Do Mediator Actions Affect Mediation Outcomes? *Dispute Resolution Magazine* (Nov. 1, 2017) (available at http://bit.ly/3pFXtL3).

The study has evidence that caucusing increases the chance that disputants will return to court to file an enforcement action.

A study by the Maryland Judiciary finds that, in the short term, the more caucusing is used, the more participants are likely to feel that the neutral controlled the outcome, pressured them into solutions, and prevented issues from coming out. Maryland Judiciary Statewide Evaluation of ADR: District Court, What Works in District Court Day of Trial Mediation: Effectiveness of Various Mediation Strategies on Short-Term and Long-Term Outcomes (2013) (available at https://bit.ly/2NfyxgE). The study also found that the more caucusing, the more disputants experience powerlessness and a belief that conflict is negative. Additionally, caucusing decreases the sense of satisfaction with the process and outcome and the perception that issues were resolved with a fair and implementable outcome. Id.

The trajectory of mediation may be mirroring a fractured, polarized society where conversation is perceived as awkward, if not dangerous.

In a 2018 study of effectiveness of various mediator behaviors in custody matters, the researchers found that the greater use of caucusing had no statistically significant impact on reaching an agreement and an increase in faith in the mediator, but a decrease in faith in the problem-solving potential with the other party. Lorig Charkoudian, Jamie L. Walter & Deborah Thompson Eisenberg, "What Works in Custody Mediation? Effectiveness of Various Mediator Behaviors," 56(4) *Family Court Review* 544 (2018) (available at https://bit.ly/3sbLlDu).

Parties often enter mediation after years of battle and mistrust created by their conflict. Imagine some of the core notions of the adjudicative model, which are not far behind its façades of "truth" and "justice": *We are right and you are wrong; We are going to win and you are going to lose.*

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In short, too much heat. Way too much.

Couple with this the potential for weaponizing numbers through positional bargaining and its usual inherent negative messaging and battle. That sets the stage for a digression from discussion to further adversarial competition.

Trust and its necessary intimacies are hard enough to develop. Doing it from remote caucus rooms, even with the help of an accomplished neutral, is too often a steep and unduly painful climb. We need to ask why it is primarily lawyers and their ethos and institutions that use the caucus model, as opposed to business leaders and related entities.

The latter have somehow recognized, perhaps for very discernable reasons, that lobbing numbers from distant corners of a deal or dispute are a poor way to establish rudimentary elements of constructive, albeit difficult, discussions and agreements.

In his 2008 book The Speed of Trust, author Stephen Covey emphasizes some of the fundamental wisdom and bonuses of such intimacies and trust-building: where these positive elements exist, deals and resolution are faster and, importantly, less expensive.

Conversely, the less trust, the longer it takes and the costlier resolution can be. We need to be responsibly aware of how often we have seen disputes where spent resources, money and goodwill, by the time the dispute hits our front door or our computer screen, make it all but intractable.

How much deeper is that hole than it should have been? Mediators might help dig parties out by bringing them together.

## More Training Needed

Getting settlements at the price of limiting or foreclosing dialogue is anathema to mediation in any case. Mediators are, by calling, the practitioners who "make talk work," perhaps even more so in this age of the pandemic and virtual-only "contact."

In this era of impoverished dialogue—or no dialogue—we need one professional who is expert in nurturing and promoting dialogue. To have the default mediation process be "no caucus" is going in a worrisome direction.

Note that different schools of mediation have different uses of the caucus and different process goals. Here are some variations:

- Never Caucus ➔ Understanding-Based Mediation
  *Goal* = understanding
- Sometimes Caucus ➔ Classical Facilitative: Caucus only when needed, and return to joint session
  *Goals* = understanding, problem-solving and agreement
- Follow the Parties ➔ Transformative
  *Goals* = empowerment and recognition
- Always Caucus ➔ No Joint Session/Settlement Brokering Primarily Between Parties' Attorneys
  *Goal* = get a deal done

For more on "Understanding-Based Mediation," see Gary Friedman and Jack Himmelstein, Challenging Conflict: Mediation Through Understanding (ABA Publishing 2009); for more on "Classical Facilitative," see Joseph B. Stulberg and Lela P. Love, The Middle Voice, 3d edition (Carolina Academic Press 2019), and for more on "Transformative," see Robert A. Baruch Bush & Joseph P. Folger, The Promise of Mediation: The Transformative Approach to Conflict (Jossey-Bass 2004).

The Always Caucus/No Joint Session Model is not being widely taught—and perhaps not taught at all. (See Charts 1 and 2 above and below.) In the IAM survey, virtually all IAM mediators received training where a joint session was used, although the extent and sophistication of training in any model remains an unanswered question.

**Chart 1: Training**

If you had mediator training, what was primary model taught?
**95% trained to use joint session** — Virtually all IAM mediators received some training.
(129 responses)

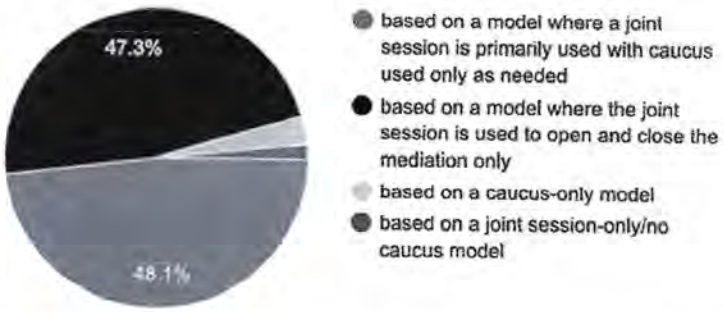
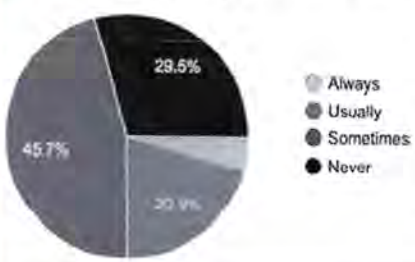



**Chart 2: Caucus v. Joint Sessions**

I keep the parties throughout the mediation... (129 responses)

... in caucus = always, usually or sometimes = 66.5%




... in joint session = usually or sometimes = 29.5%

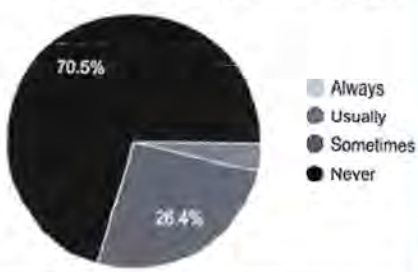
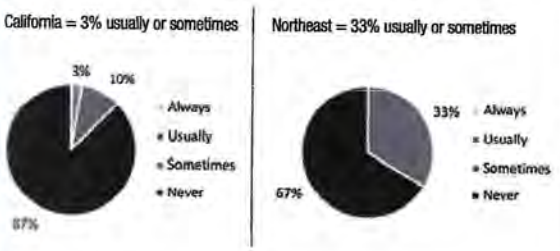


**Chart 3: Regional Breakdowns**

I keep the parties in joint session throughout the entire mediation (no caucus)




I keep the parties in caucus throughout the entire mediation


In all cases, the developing mediation "profession" should own the fact that three hours in a basic 40-hour mediation training devoted to the joint session is woefully inadequate.

## Chart 1: Training

Those same mediators reported that overwhelmingly their source of cases was lawyer referral, and the main reasons they did not use a joint session was that attorneys and, second choice, parties did not want a joint session. In other words, attorneys are having a mighty influence on the default process used by mediators.

This is a remarkable finding as it challenges the long-held tenet that a dispute belongs to the disputants. See ABA Model Standards of Conduct for Mediators, Standard I. Self-Determination (2005) (available at https://bit.ly/3av1L4l). Many mediators, however, fear they will be de-selected by lawyers and lose substantial income if they insist on hosting joint sessions. As Deep Throat said, "Follow the money."

## Chart 2: Caucus v. Joint Sessions

After the Chart 2 overview on the preceding page, note on Chart 3 above that regional differences in the United States result in different practices with respect to keeping parties in caucus throughout the mediation.

## Chart 3: Regional Breakdowns

The conclusion about regional differences is supported by a 2018-2019 survey by Dwight Golann in Boston State Superior Court, examining tort and contract cases. Golann, a law professor at Boston's Suffolk University Law School, found that 83% of the mediations in the sample of 29 cases had a "substantive" joint session, where disputants had the opportunity to discuss the merits of the dispute with the other side. This information shows that the joint session is, at least, alive in some areas of the market.

It is worth noting that caucus-only mediators report that their primary goal is getting a deal done, many believing perhaps that "closing deals" is the primary way to get repeat business. At the same time, there are multiple goals for those mediators using joint sessions. See also Chart 4 below.

## Chart 4: Law + Facts

It should be noted that even though the joint session is taught and promoted in nearly every respected mediation curriculum throughout the world, both in law schools and in mediator training programs, the joint session is not universally being used, as the IAM study shows.

And when it is used, it is often in a context where the rote legalistic and binary equation dominates: *LAW + FACTS = A CONCLUSION.* But it is an equation that misses the complexity and essence of humans in conflict.

Many mediators consider it a privilege to be involved in helping others resolve their disputes. We have witnessed many situations where, with the proper tone, content, management and example, disputants and their representatives can come to better understand their conflict and develop more nuanced outcomes

*(continued on next page)*

**Chart 4**

**The most important value(s) supporting a choice of ...**

| Joint-Session-Only or Joint-Session-with-caucus-as-needed | Mostly-Caucus or Caucus-Only |
|---|---|
| • Develop better understanding, and possibly trust, between disputants<br>• Enhance overall party satisfaction with fairness of process and outcome<br>• Integrate relational and emotional aspects into the mediation process | • Get a deal done |

ADR Practice

*(continued from previous page)*
through direct communications where mediators enable trust and problem-solving.

When people are in the same room—or on the same screen—they behave differently, and often better, when confronted with their own common humanity.

Do we help people in conflict interact and perhaps better direct the outcome of their dispute through a joint session and collaborative process? Or do we leave them with the negatives of the lawyer's adage that the sign of a good settlement is where everybody walks away unhappy (and with a stale tuna sandwich) at the end of a day?

Do we help them get out of the spin cycle of positional bargaining and the emotional misdirection that comes with it, knowing that we as neutrals cannot do the lifting of spirit and healing of wounds without the parties' help?

* * *

Let's reimagine the mediation we began with:

The sea captain-plaintiff was welcomed into the mediation session, accompanied by his lawyer. The inside counsel of the shipping company, who had known and admired the captain, was the key spokesperson for the company, accompanied and supported by outside counsel who would handle the litigation if the case proceeded in that direction.

Everyone was offered coffee, fruit, and pastries from a common plate. After introductions all around, and according to discussions and arrangements prior to the mediation session, the captain was invited to explain the situation.

The captain talked about his decades with the company and his unblemished record before his ship went down. He was supported by nods from the inside counsel.

The captain explained what had happened the day the ship sank. The first mate had supervised the placement of the ballast—which was improperly distributed. Yes, in the end the captain was responsible, but he had no reason to doubt the first mate's job—done many times without hitch.

After this incident, everything had changed. No one at the company treated him with the respect and cordiality he had come to enjoy, even though the damages from the ship's sinking were covered by insurance.

But the captain was damaged. And then to be fired! He was the most senior employee in his class, the most experienced, the most loyal. He couldn't see his dismissal as anything except age discrimination, except perhaps retribution for the incident.

His lawyer broke in, wanting to summarize the legal case. The mediator welcomed the lawyer's intervention. The lawyer explained why he expected to enjoy a complete victory in court.

The mediator turned to the company's representatives. The company's inside lawyer described his own regard for the captain, shared by others in the organization. He expressed surprise to hear what led to the ship's sinking, and said it was true that the captain had been somewhat socially ostracized—but not because of the sunk vessel, but because he himself had withdrawn.

The inside counsel explained the downsizing rationale for the captain's dismissal—not connected with age discrimination but with economic and personnel decisions that seemed compelling.

The company's outside counsel made the case that his was a clear "win" in court—no liability for age discrimination.

Both sides' legal representatives expected a complete victory in court. The mediator explored their legal analysis, which was educative for the parties, and the costs of pursuing the matter in litigation, which were high. A resolution through courts would take a long time and after years of expenditure of time, money, resources, and goodwill, even a "winner" wouldn't feel like a "winner."

> Many mediators fear they will be de-selected by lawyers and lose substantial income if they insist on hosting joint sessions.

And then a search for an acceptable outcome began. In the end, the company paid an amount—less than the demand but a respectable low six-figure amount. The company helped with setting the captain up with employment counseling, and comfortably agreed to positive references.

The captain, not wanting another full-time job, felt recognized for his lifetime service to the company. Each side expressed regret and apologized: the company for how the captain's employment had terminated so abruptly, and the captain for jumping to worst conclusions about the people he had worked with and respected.

* * *

The structuring of a mediation is, of course, a personal choice. But gentle and wise mediator guidance to consider use of the whole dance floor, instead of being confined to one's small but comfortable corner, can assist people in increasing their intimacies, listening better and perhaps walking away with a more optimal agreement.

We think there should be a presumption of a joint session with dialogue between the parties—a rebuttable presumption in particular cases, of course. Let's be sure that mediators remain leaders of understanding how to promote talk. Let's encourage the mediation field to continue to be expert in dialogue in a shrinking world which so desperately needs human interaction, collaboration, and civil conversation.

## Quotes on Caucusing & Mediation

Revered leaders in our field have said:

It is not mediation if parties are kept apart.

*—UC-Irvine School Of Law professor and scholar Carrie Menkel-Meadow*

Our society devotes too little resources to healing. Mediation is a method for repairing the social fabric.

*—Former U.S. Magistrate judge and mediator Wayne Brazil*

THE NATIONAL ACADEMY OF DISTINGUISHED NEUTRALS

# Benefits of Virtual ADR in Insurance Disputes: Ten Reasons To Consider Resolving Disputes Virtually

**JAMS**

**USA** March 25 2021

There has been a lot of talk lately, and a lot of presentations, about the pros and cons of virtual alternative dispute resolution (ADR)—video arbitrations and mediations. I recently participated in one such program, but it had a slightly different twist since it was focused on insurance litigation and the insurance industry.

While many of the pros and cons of virtual ADR are generally applicable to a wide range of matters, some have special importance in the context of insurance disputes. In part, this is because insurance companies are in the business of handling insurance claims and litigation. Unlike many businesses, where litigation may be a rarity, disputed claims are commonplace in the insurance industry. As a result, the cost and efficiency of handling claims and disputes are critical and can make virtual ADR extremely attractive.

**Time and scheduling.** Two of the common obstacles to traditional in-person ADR —both mediation and arbitration—are time and scheduling. In large commercial mediations, the parties, including the policyholder, the insurers, the relevant lawyers and experts, and the mediator are commonly spread across the country, and often around the world. A mediation in such a case requires travel to get to the mediation, a full day or two in the proceedings and frequently another day to get home, especially where the mediation runs late into the night in an effort to achieve a settlement. The time and expense of travel and downtime can be avoided by having a virtual proceeding, as can the need to reserve an entire day when it is not necessary for a session. The case handler, the lawyers and others involved can use the time to manage other claims and matters, significantly increasing productivity.

**Flexibility.** While the savings from the elimination of travel and downtime are fairly obvious, it may be useful to illustrate the flexibility of virtual proceedings with an example. Consider a large environmental or mass tort coverage case. A first step in a

mediation is commonly a presentation by defense counsel and coverage counsel concerning the underlying case and the relevant insurance. In some cases, this is followed by a discussion of information needs. Policyholders are often frustrated when they have traveled and set aside a day but are told after the initial presentations that an insurer needs to consult with the home office to get authority. In a virtual setting, this initial session can be limited to a discussion of the case and the exchange of information necessary to move forward with negotiations.

**Access to authority.** As much as mediators typically insist on the attendance of persons with authority to settle, insurance mediations often run into issues of authority. In some cases, the insurer did not expect to enter into active negotiations at an initial session. In others, an adjuster came with authority, but needs more to settle a case. In either situation, a virtual mediation permits a more senior company representative of either party to participate in some or all the process. This can be a major advantage and can help to avoid the frustration of an inability to move forward associated with the absence of a more senior representative. Senior managers who lack the time or inclination to take several days to attend a mediation are often willing to participate virtually. A similar dynamic occurs in virtual arbitrations where senior decision-makers may want to watch a key witness or argument without having to travel and be present for an entire, proceeding.

**Access to coverage counsel in mediating an underlying case.** The flexibility provided by virtual ADR can be particularly beneficial where there is a substantial case, perhaps a class action or mass tort case, and insurance is an important component of the parties' ability to settle. Parties are often reluctant to incur the time and expense of having coverage counsel attend a mediation of the underlying case, but then reach an impasse because the coverage issues and availability of insurance are critical to their ability to settle. Virtual mediation allows the participation of coverage counsel and underlying counsel, together or individually as needed. The ability to bring the right parties together at the right times, without necessarily having them all in the same physical location, is a major benefit of virtual ADR.

**Access to multiple players.** A unique element of many insurance disputes is the number of players involved. This may occur where there are towers of insurance with multiple insurers, multiple years of relevant coverage or multiple insurance programs potentially in play. In each of these scenarios, finding a time and place where lawyers and company representatives for all the players can

participate may be very challenging, particularly where some of the insurers are based in London or other non-U.S. markets. Virtual ADR makes it much easier to schedule a mediation or arbitration session, including during hours outside the traditional workday since participants may be willing to participate from home or office early in the morning or in the evening.

**Access to experts.** It is often useful to have an expert attend a mediation. It may be an expert on underlying liability, a coverage issue, lost policies or allocation. Direct discussions between the parties and the experts can help the parties to understand and test their adversary's positions and, in some cases, the credibility of the experts or their positions. Experts can be available virtually, reducing the time and expense of attendance.

**Less idle time.** Another advantage of virtual ADR in multi-insurer disputes is the ability to break up the discussions into smaller chunks. All of us have experienced the frustration of sitting idly while the mediator moves from room to room, trying to get a sense of each party's respective position. A virtual proceeding can be broken into separate sessions, with the mediator meeting with each party individually. This approach has proven very effective in multi-party cases.

**Training.** Many insurers have strict requirements about use of multiple attorneys at a hearing. This is especially relevant where travel is involved. Virtual proceedings allow the additional attendance of a less senior attorneys or client representatives at a substantially lower cost. Whether that cost is borne by a client or its law firm, it provides an important training opportunity in virtual proceedings.

**Expanding the pool of available mediators.** Because disputes can occur anywhere, parties have traditionally tried to agree on a locale for the mediation and to find a mediator in that location in order to capitalize on local knowledge and to avoid the time and expense of travel. In some cases, the parties agree on an out-of-town mediator because the mediator is mutually acceptable and viewed as exceptionally talented and able to understand complex issues in a particular case. In the virtual world, location is much less important, thus widening the pool of acceptable, available mediators.

**Avoiding the abrupt race to get home.** Mediations often pick up pace as the day wears on. In many cases, however, that momentum is disrupted by one of the participants having to abruptly stop to race for a plane or a train. While that time pressure can sometimes

be productive, it can also be extremely frustrating to parties that feel they are on the cusp of getting a matter resolved and are committed to staying as long as it takes. This situation can often be avoided in a virtual mediation where the parties are appearing from home or their offices.

There are certainly challenges with virtual proceedings. Parties need to be comfortable with the technology and have the proper equipment. They need to be comfortable interacting with and reading each other onscreen as opposed to in person. There may be challenges of logistics and personal style. But many experienced mediators are finding that virtual mediations have significant benefits and that their success rate is similar to that of in-person mediations. These benefits have special significance for insurance disputes and suggest that virtual ADR, whether fully virtual or a hybrid, will be an important tool for claims handlers and coverage advocates for the foreseeable future.

**JAMS** - Steven R. Gilford, Esq.

INDISPUTABLY

Linking Dispute Resolution Scholarship, Education, and Practice

# PAUL M. LURIE ON GUIDED MEDIATION

APRIL 14, 2021 | JOHN LANDE | LEAVE A COMMENT

Paul M. Lurie, now a retired partner at Schiff Hardin LLP, in 2013 created the Guided Choice Interest Group and its website. It established what is now known as the Guided Mediation, which was originally called Guided Choice Mediation. Here's his description of the current process.

Guided Mediation is a collection of best practices and tools in actual use that increase mediation efficiency, get earlier settlements, reduce legal and consultants' fees, and minimize business disruption. It focuses on designing a mediation process best suited for disputes to increase the chances of a successful and efficient resolution. It is not a specific model such as "facilitative" or "evaluative" mediation. See Dean B. Thomson, Early Mediator Engagement: Lessons from Master Mediators, 15 Journal of the American College of Construction Lawyers 39 (2021).

The earlier settlement occurs, the more value it provides to the disputants because of decreased legal and experts' fees, preservation of valued business relationships, and reduced business disruption. Traditional mediators brag about the number of cases they have helped settle but do not mention when in the dispute resolution timeline those settlements occurred.

Guided Mediation emphasizes training users (including litigators, in-house counsel, clients, and mediators) to understand the tools available to design an effective mediation process, overcome impasse, and allow the earliest possible settlement. The training needs of mediators differ from those of litigators and in-house counsel.

The training needs also vary between industries. For example, construction industry disputes often have insurance issues and tiers of multiple parties. All the parties' participation may be necessary to reach settlement, but their involvement has to be thoughtfully managed as they may have different legal relationships.

Training includes understanding brain science and its mediation practice implications. See Gary T. Furlong, The Conflict Resolution Toolbox (John Wiley & Sons, 2020, 2nd ed.). Training of mediators also includes knowing how to ask the right questions.

Key tools to maximize the benefits of Guided Mediation are:

- Early hiring of mediators to overcome lawyer resistance, establish a relationship with the parties, and build process trust.
- Using mediators as impasse diagnosticians based on confidential discussions to design the best settlement process for each particular case. There are usually causes of impasse in addition to the amount of money in dispute.
- Using a multi-phase mediation process including a pre-mediation phase to satisfy parties' information needs and to allow adequate time for parties to change their settlement positions.
- Suggesting processes to overcome pre-existing impasses and those arising during mediation.
- Discouraging parties from making offers and demands (or even creating positions in their own minds) during pre-mediation until they get better insight into reasons for impasse.
- Collaboratively using experts or third-party neutrals on a binding or non-binding basis such as limited arbitration or "hot tubbing" parties' experts. Preparing for limited arbitration often itself overcomes impasse. The use of adjudicative processes as mediation tools is described in Tom Stipanovich and Veronique Fraser, The International Task Force on Mixed Mode Dispute Resolution: Exploring the Interplay between Mediation, Evaluation and Arbitration in Commercial Cases.
- Using separate mediation processes for certain parties within a larger mediation, e.g., insurers, governmental agencies, and subcontractors.

Guided Mediation users have found great benefit in having pre-mediation sessions done virtually using video conferencing, e.g., Zoom. These sessions allow prospective mediators to meet separately with parties and their lawyers to develop the trust needed for the early hiring of mediators and collaborative development of the best settlement process. Having such pre-mediation sessions virtually avoids the scheduling problems of in-person appearance of multiple parties and substantially reduces mediation time and expense. Guided Mediation also has tools to overcome "Zoom fatigue" by limiting isolation in breakout rooms. Paul M. Lurie and Robyn L. Miller, Using Zoom for Pre-Mediation Activities to Achieve Earlier

Settlements, 22 Under Construction (Winter 2020) (published by the ABA Forum on Construction Law).

Guiding Mediators manage pre-mediation to avoid surprises once negotiations begin. After the pre-mediation activity, the settlement negotiation sessions can be in person or by video. Mediators sometimes suggest preparing settlement agreements even before settlements are finalized.

The Guided Mediation process differs from early dispute resolution methods involving a written process in pre-dispute contract clauses and procedural manuals. Contract clauses should not be too prescriptive so that parties can design the most appropriate mediation process for each unique dispute. Changing the legal culture to achieve early dispute using contract clauses and manuals is not likely to be effective while lawyers and law schools still view preparing for litigation or arbitration as necessary even for disputes likely to settle.

Guided Mediation has begun collecting reliable data showing that its processes are considered best practices. Too much mediation literature and discussion wrongly assume that "one size fits all." For example, mediation tools are much different for employment and family situations. This is one reason why it is so difficult to collect data on best practices across different fields.

The Guided Mediation website has been accessed by more than 14,000 viewers and is extremely popular in the U.S. and around the world. Guided Mediation is recommended by formal groups in the International Mediation Institute which are promoting the improvements to the mediation process identified by the Global Pound Conferences. One of these IMI groups is a partnership of the International Mediation Institute, Pepperdine University Caruso School of Law, and the College of Commercial Arbitrators.

MEDIATION SKILLS AND TECHNIQUES

ABA

APPEALING IN GOOD FAITH | GOOD FAITH IN DISCOVERY | DEATH OF A SETTLEMENT

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# Litigation

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SECTION OF LITIGATION

## Good Faith

# Death of a Settlement

DWIGHT GOLANN

The author is a professor at Suffolk University Law School, in Boston.

You are trying to settle a case set for trial next Monday. After weeks spent trading unrealistic offers and demands, you finally get a signal that the other side is serious. You've prepared your client for this moment, reviewing with him the strengths and weaknesses of his case. You've given your best advice about what terms would make sense to resolve it.

Now it's crunch time.

Until this moment the client has followed your advice. Now, suddenly, he refuses. He denies the existence of vulnerabilities that you thought he understood and accepted long ago. He insists that he has already compromised way too much. He won't give up any more; in fact, he tells you to take back some important concessions already offered.

You know that the other side will cry bad faith—that backtracking now may well blow up the entire process, the whole prospect of settlement.

What's going on?

When clients behave like this, the root cause likely lies in this basic reality: Despite the popularity of win-win bargaining, during settlement negotiations most litigants feel they are losing rather than sharing a win.

The perception of losing spurs powerful emotions, different in kind from others we see in the litigation process. They are intense, arise at awkward moments, and provoke dysfunctional tactics. And experience suggests they are perhaps the single most important reason settlement negotiations fail.

What causes this behavior? How can we lawyers respond to it? As we explore those questions, let's consider these two cases:

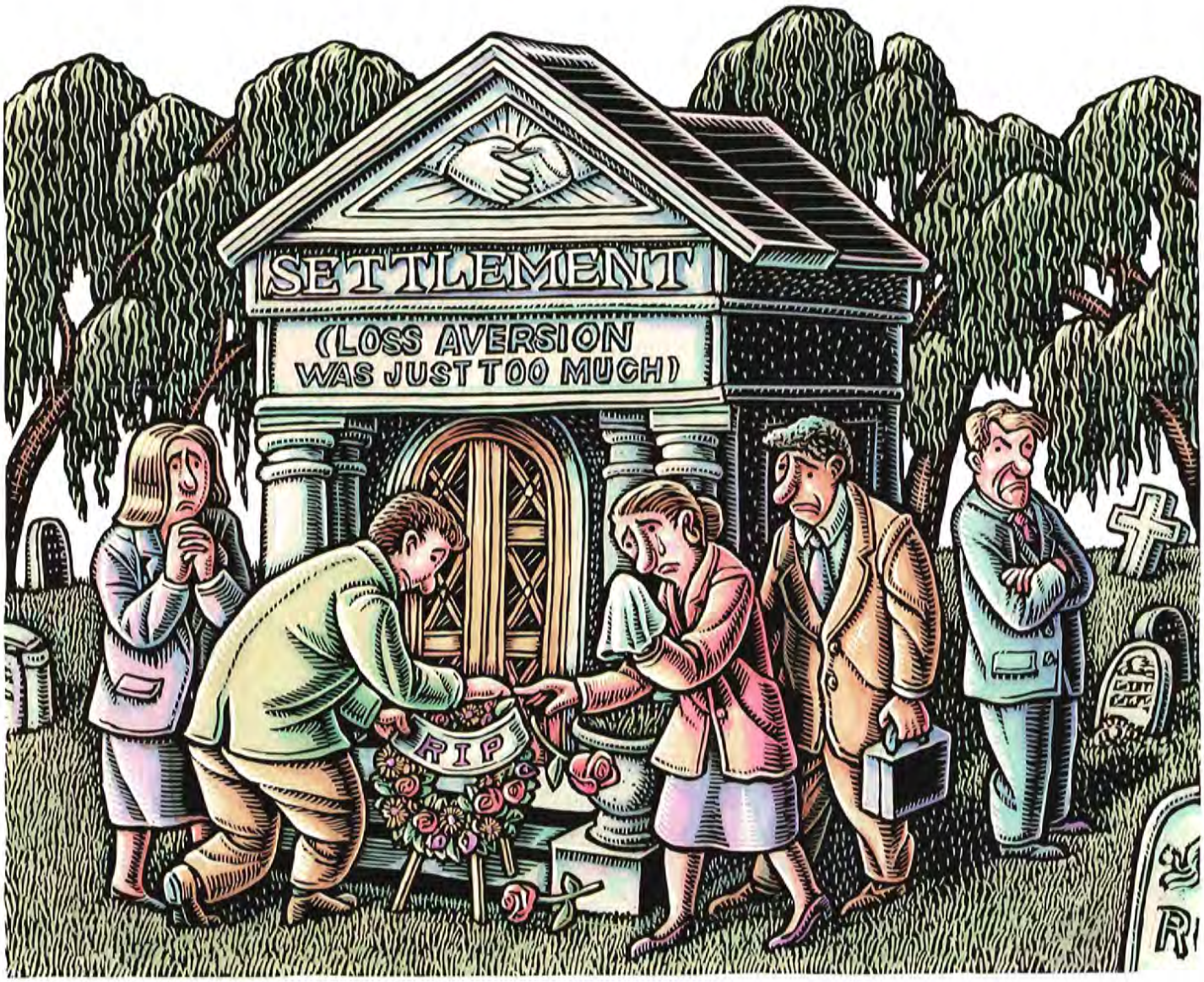
*First Case:* A small New England town. A state trooper begins a high-speed chase of a drunk driver. Pursuing rapidly, the policeman runs a stop sign and hits a third car crossing the intersection. It's a classic T-bone collision. The trooper is unhurt, but the driver of the third car dies instantly. He was just 17 years old.

The driver's family sues the state, arguing that the trooper was negligent in ignoring the stop sign. A jury will decide whether the officer acted carelessly.

As counsel for the trooper, we begin to prepare his defense. We investigate, looking for facts to show that the victim had been drinking or irresponsible. Instead we learn that the boy was a model student who left behind a loving family. Still, the trooper, we will argue, showed initiative in giving chase to a dangerous driver. We know that local juries consistently have found for the police in similar circumstances. And state law caps liability at $150,000.

Two years later, as trial nears, we offer to settle at $100,000. The offer is rejected.

We wait a few weeks, then raise the offer to $120,000. Plaintiffs' counsel says that she'll recommend it to her clients. Yet, word




comes back that the family has refused. They make no counteroffer and give no reasons.

*Second Case:* The chief financial officer of a start-up sues his former company, claiming that his interest in the company has been illegally diluted. Dilution—that is, a reduction in the percentage of a company's stock held by an investor—is common in start-ups. As a venture prospers, the owners solicit additional funding, which they repay by issuing new stock.

The issuance of new stock lowers the percentage of stock held by the early investors. But the infusion of additional capital from outsiders and their show of confidence in investing it typically make the company much more valuable. The increase in the company's value usually more than offsets the dilution, producing a net rise in the founders' interests.

In this case, the former executive's 2 percent stake in the company is now worth $6 million, far more than the value of the 5 percent share he'd had when he joined the company. He claims, however, that he received special assurances that as new stock was issued, his share percentage would not go down. Without dilution, his stock would be worth $15 million instead of $6 million.

## Feelings of Loss

In each of these cases, feelings of loss posed challenges for settlement. What were they? And how did they play out?

Why is the feeling of losing in settlement so common? To avoid having a party feel any loss, a settlement has to restore the party to where he or she was before the dispute arose or place the party where he or she expected to be, absent the misconduct. In a sense, the common law provides for this, giving each prevailing tort victim an amount of money intended to compensate



Illustration by Lisa Haney

for what has been lost and granting contract plaintiffs damages equal to their reasonable deal-based expectations.

But common-law definitions of compensatory damages often are inadequate. An accident victim, for instance, may feel that even a "full" award of damages does not leave her as well off as before the injury, and a reasonable businessperson may view the legal definition of lost profits as much too narrow to cover his expectations. Even a defendant who prevails in court may similarly feel that a verdict of "not liable" does not begin to compensate for the damages the lawsuit has done to his business and reputation.

For most clients, simply being in litigation imposes other costs in the form of legal fees and disruption to their lives or businesses. To feel fully compensated, then, a litigant usually would have to obtain settlement terms that left him or her *better off* than before the dispute arose; for *each* side to avoid feeling loss in settling, *both* sides would have to be made more than whole.

But that's nearly always impossible. Even when good negotiators use the best bargaining techniques, some feelings of loss in settlement are nearly inevitable.

Between the time a case starts and the time a party enters settlement negotiations, the party's benchmarks for measuring gain or loss often change. Good lawyers counsel clients about the high costs and limited remedies available in litigation, as well as the risk of losing. Their advice may cause a client to lower his or her expectations. In effect, litigants who listen to good legal advice go through at least some of the process of adjusting to loss before they enter into settlement negotiations.

Often, though, parties cling to an unrealistic benchmark or expectation. Litigants may read in the media about a dramatic case that inflates their expectation for their own outcome. Stories that grab publicity and attention are by definition exceptional, however, and do not reflect the modest results that are vastly more likely. The phenomena known as availability bias and vividness bias—the tendency of the human mind to notice and give special weight to striking events—play an important role here. They lead clients to give extreme examples exaggerated significance in their decision-making.

As a result, people consistently overestimate how often exceptional legal outcomes actually occur. Even when parties concede that their case is not identical to a dramatic one and try to adjust for the difference, they typically fail to adjust enough.

Human beings also suffer from other forces that distort their judgment. A simple example is the above-average effect. Most people believe, for instance, that they will live longer than the average of their high school class. Even sophisticated professionals are subject to this distortion. Doctors for example are four times as likely to overestimate the life expectancy of their terminally ill patients as to underestimate it.

Lawyers are subject to cognitive forces as well. Eighty percent of surveyed lawyers, for instance, rated their personal ethical standards as higher than average. And even if both you and your client are able to escape these influences, the people on the other side of your case probably cannot.

Litigants with unrealistic goals and expectations are guaranteed to feel loss as they bargain. What standards did the parties in the auto accident and stock dilution cases use to measure the settlement proposals they received? In the accident case, no amount of money could replace the family's beloved son, and it seems likely that other forces were in play as well. In the stock dilution case, the plaintiff presumably had been advised to discount his claim to reflect the risk of losing, but for him the case had other significance too.

## Loss and Decision-Making

What effect does the perception of losing have on decision-making? Daniel Kahneman and Amos Tversky, who pioneered the field of behavioral economics—Kahneman won a Nobel Prize for that work—proved that people consistently take the risk of sustaining large losses in the future to avoid the certainty of taking smaller losses in the present, even when doing so will on average cost more, a phenomenon they called loss aversion. Their work also showed that people are more prone to accept an unreasonable risk to avoid a larger loss than a smaller one.

These findings have significance for legal negotiations because the possibility of settlement often requires parties to make a choice between accepting an immediate loss by settling or continuing in litigation with the hope of avoiding loss entirely but with the risk of losing much more. Loss aversion helps explain why litigants so often opt for a larger, unreasonable risk of losing at trial to avoid a smaller-but-certain loss in settlement.

Loss aversion distorts decision making even when humans are calm. What happens when a party also becomes upset? Suppose, for example, that a potential settlement appears to let an opponent buy her way out of improper conduct by merely paying money. Kahneman and Tversky found that when someone sees a decision as having an unfair or immoral result, loss aversion is much stronger. Losing a dollar unfairly, researchers report, feels like losing $2.50–$2.75, not $1.00, while unexpectedly gaining a dollar has a psychic value of only 70–75 cents. In other words, a loss that appears unfair outweighs an equivalent gain by a ratio of nearly 4 to 1. That's a powerful variance.

Humans' strong reactions to loss were first reported by psychiatrists in the context of people suffering personal tragedies, such as the death of a loved one. Bereaved persons, it was observed, feel internally torn between their wish to deny the loss and the knowledge that it has occurred. Sigmund Freud described such patients as similar to litigants. Their protestations resembled legal "plaints," he wrote, and recovery required a patient to work out a compromise between the wish to deny the loss and reality.

Freud expressed surprise over how difficult and painful this process of mental compromise can be.

Parties who have not come to terms with losing in settlement are likely to behave much like Freud's patients. As they consider making concessions, they are embroiled in two negotiations. One is the explicit bargaining process that occurs between the two sides in a settlement negotiation. The other is a purely internal struggle that goes on in a party's heart and mind, to work out a compromise between the persistent demand to avoid any loss and the reality of what is achievable.

The internal and external negotiations go on concurrently, often leading parties to make contradictory decisions or preventing them from making a decision at all. Adding to the confusion, the affected person is often not aware that the internal negotiation is occurring at all.

Sometimes the problem goes even deeper. A case itself may carry special emotional or psychological significance, and when that happens, settlement on any terms is a loss. The widow of a 9/11 victim, for instance, delayed in applying for financial compensation, though she had no dispute with how much she would receive. "It's hard," she said. "There's a finality about it. . . . When we sign, then it's done. He's really gone." She knew of course that her husband had died, but keeping the claim open allowed her to avoid some of her feelings of losing him.

Similarly, I watched a woman who had gone through years of bitter litigation with her children finally reach agreement to settle on favorable terms, but then she raised one obstacle after another to implementing the settlement. It seemed that, as miserable as the lawsuit was, its existence represented her only remaining connection to her children, and she did not want to end it. When a case itself has meaning to a litigant, settling on almost any terms feels like a loss.

## Delayed Loss Reaction and Client Behavior

There are other levels of reaction to loss. Imagine a client who behaves reasonably during most of a negotiation process but, as it approaches a conclusion, suddenly explodes with emotion and makes dysfunctional decisions. What causes what might be called a delayed loss reaction?

This behavior is also most poignantly observed in the context of purely personal losses. Psychiatrists have reported that some patients who suffer a loss do not show a normal level of grief, apparently because they take refuge in a fantasy in which the loss has not occurred. Thus, for example, when hundreds died in a tragic nightclub fire in Boston, some family members claimed that their loved one had left the club before the fire broke out and was wandering with amnesia. As long as survivors clung to such fantasies, they did not feel as much grief over their loved one's death. Eventually, however, sometimes only after months or years, the fantasy collapsed and the feelings of grief that others had faced much earlier suddenly rushed in.

Some parties use their legal case to avoid feeling loss in a similar way. A terminated employee may insist, for instance, that the court will award him full compensation, even restore his job. A defendant may express complete confidence that she will be vindicated at trial. Parties are especially likely to deny reality in that way when a dispute threatens their personal identity—for instance, as a competent employee, decent boss, or caring parent.

As long as the litigation continues, such parties can cling to their fantasy and deny much of their loss. But when in the course of negotiations it becomes clear that they won't be fully compensated or vindicated, they suddenly feel the pain they had avoided until then.

> A loss that appears unfair outweighs an equivalent gain by a ratio of nearly 4 to 1. That's a powerful variance.

When that happens, litigants may, in the middle of a negotiation, display the stages of grief that Elisabeth Kübler-Ross famously described in patients with terminal illnesses: denial, anger, unrealistic bargaining, depression, and acceptance. Others have noted that individual reactions vary greatly: A victim may skip over a stage or repeat it—for example, going from denial to anger and then back to denial.

As parties to lawsuits realize they are facing the death of a claim or defense, they often behave in ways remarkably similar to the terminally ill. Lawyers report such behavior most commonly in divorce cases. That's not surprising because divorce litigants often feel they are losing important parts of their identity as a spouse, a parent, or a member of the community.

Equally intense reactions arise in cases based on other important relationships, such as employment, partnerships, and family businesses. The phenomenon even occurs in corporate disputes—for example, when an executive feels that a settlement threatens his core identity.

Parties going through this kind of delayed loss reaction may fail to perceive—or refuse to acknowledge—the significance of evidence that would force them to accept an unwelcome result.

They may also become angry as they confront the likelihood of losing. A plaintiff who makes an insulting first settlement demand, for instance, may be proclaiming in effect, "If the system were fair, that amount would be cheap for this case!" And a defendant who refuses to make a concession may be saying, by implication, "I spit on your demand!"

Disputants feeling sudden loss also make unrealistic bargaining decisions. Depressed litigants may obsess over decisions or be unable to decide whether to make a concession at all, paralyzing the bargaining process. And a disputant who vacillates back and forth between stages of grieving is likely to change tactics unpredictably.

## The Stock Dilution Case

That is what occurred in the stock dilution case. After three years of litigation, the case went to mediation. It began with an opening session. The parties then adjourned to private caucuses. The plaintiff demanded $9 million to settle. The company offered $500,000.

The bargaining moved forward slowly from there. At 5:00 p.m., the plaintiff lowered his demand from $7 million to $6.5 million. The company responded by increasing its offer from $2 million to $2.25 million. Then the bargaining stalled.

The plaintiff insisted he'd given up too much already. He attacked the chief executive officer (CEO) as an ungrateful twerp who had forgotten the crucial guidance that had enabled him to grow from college nerd to chief executive of a successful company. For the CEO to begrudge him a fair share of the bounty was, in his view, outrageous.

The mediator listened respectfully, then mentioned that the defense had produced emails in which, they argued, the plaintiff had agreed to give up his anti-dilution protection in return for an enhanced bonus. The plaintiff, however, rejected the emails as meaningless chatter, unworthy of consideration.

Eventually, the plaintiff agreed to drop to $6.25 million and the mediator left to deliver the offer. As the mediator was talking with the defense team, the plaintiff's lawyer interrupted to tell him that the client had changed his mind and now insisted on staying with his earlier $6.5 million demand.

Returning to the plaintiff's room, the mediator found the executive very agitated. He exclaimed angrily that the company could pay him what he knew his claim was worth, or see what happened when they got to trial. The mediator noted that he'd already presented the new $6.25 million demand and raised the concern that the company would react badly if the plaintiff now withdrew that number. The plaintiff remained adamant, however.

As expected, the defense team labeled the plaintiff's move bad-faith reneging and walked out. The mediator remained hopeful of reviving the process but was not sure how it could be done.

## The Special Impact of Loss Reactions

The dilution plaintiff's eruption, apparently prompted by the collapse of his hopes for "fair" compensation, is typical of a delayed loss reaction. Such responses pose special problems for settlement in part because of when they appear. Most lawyers begin a negotiation at extreme positions, in an effort to influence the opponent's expectations and set up a favorable compromise. Clients, however, may hear an opening offer as confirmation of their unrealistic expectations.

At some later point, the lawyer must ask for authority to make serious concessions. The attorney sees this as part of a familiar process, but it forces a client who has been indulging in fantasy to confront for the first time the reality of losing. Not surprisingly, such clients often react emotionally, sometimes showing Kübler-Ross behaviors.

At that point in the process, however, other participants are often impatient to get to a deal, and even a mediator may think that the listening-to-feelings phase is, or should be, over. The fact that delayed loss reactions so often occur late in the settlement process magnifies their disruptive impact.

In addition to intensity and timing, loss reactions pose a special problem because they so closely resemble the tactics used by adversarial bargainers. When a party going through a loss reaction suddenly refuses to make more concessions, for instance, an opponent is likely to interpret the behavior as tactical stonewalling. If an upset litigant retracts an offer already made, he or she risks being seen as purposefully reneging, acting out of bad faith rather than emotion. When a lawyer thinks an opponent is intentionally using hardball or bad-faith tactics, the lawyer is tempted to respond in kind, further escalating the problem.

## Dealing with Clients Suffering Loss

So how should one deal with a client suffering from strong feelings of loss? First—and by far the most important—is to understand that what is driving a party's dysfunctional behavior, or an opponent's apparent bad faith, may be strong feelings rather than conscious strategy.

Second, having identified the problem, the next step is to resist the temptation to try to fix it. We lawyers are valued for our ability to solve problems. We might, for example, instinctively try to minimize what has happened or point out the advantages of settling. But people who have not fully processed feelings about losing will usually reject any suggestion that there is a brighter future or another way of looking at their situation.

Better instead to acknowledge the client's perception that the situation is bad and cannot be fully remedied, and let the client experience those feelings. "What has happened," we might say, "is truly awful. Nothing can really make up for what you have gone through."

Clients in that situation need to undertake a process of grieving for what they are losing by settling. It is in fact a form of mourning, a kind of funeral for the death of the client's hopes and dreams for the case. If holding a funeral feels like too much, then simply think of it as like comforting a bereaved friend or relative, attending a wake, or making a condolence call.

It's also important not to become defensive. Terminally ill patients often lash out indiscriminately at their doctors and nurses, and clients sometimes blame their lawyer—or their mediator—for what is happening. When that happens, it's helpful to remember that the angry party is usually not denying the truth of what has been said but, rather, is trying to avoid the feelings it evokes.

## When a case itself has meaning to a litigant, settling on almost any terms feels like a loss.

As we work with clients going through loss, it's also necessary to keep the larger settlement process on track. That is especially important because parties' loss-induced behaviors are easily subject to misinterpretation by the other side. To the extent possible within the constraints of confidentiality, it's helpful to alert an opponent to what is happening so they don't react in an unhelpful way ("My client found your last offer very upsetting. It'll take some time before we have an answer for you."). We also may need to slow down or suspend the settlement process—for example, by suspending a negotiation or mediation to give a distraught client time to work through difficult feelings.

In the stock dilution case, I met with the plaintiff and his lawyer a few days after the mediation and asked him to tell me more about his early days at the company. He described having begun as a consultant and then gradually becoming closer to the CEO. It was a chance to go far beyond his usual work and become a key player in an exciting venture. He became, he said, a mentor to the young executive, a role that gave him great satisfaction. The plaintiff felt the loss of his role in the company deeply. It also felt agonizingly unjust to be discarded just as the venture was showing its possibilities. He had invested too much, he said, to take a mediocre deal.

When he finished, I said that it was impossible to really understand what he'd gone through, but I realized that his was much more than a simple contract claim. He felt he'd been betrayed by someone he'd been close to and shabbily treated by a person he'd helped to succeed. I could only begin to imagine, I said, how hurtful that must be.

As we talked, the plaintiff gradually became calmer. Eventually, I asked him to think about resuming the negotiation.

A few days later, I called the defense lawyer with a new settlement proposal. She said, however, that the company was no longer interested in settling. Two years later, the local legal newspaper reported that the company, having been abandoned by its young clientele, had filed for Chapter 11 protection. There was no indication whether the case was still going on.

With hindsight, I wish I had probed the plaintiff's feelings earlier and helped him work through them. Failing that, I should have adjourned the mediation when he became agitated, rather than pressing him to make an offer that he then revoked.

In the traffic fatality case, the plaintiff's lawyer called back two weeks after rejecting our offer, to say that the family wanted to meet informally with the trooper. Initially, we were resistant: What was the point of having hurt and angry people rehash the facts, given that the evidence was largely undisputed? Eventually, though, we agreed.

The meeting was extraordinary. The victim's mother, father, and sisters came. They talked not about the case, but about their lost son and brother. The mother read a poem to the trooper describing the hopes she had held for her son and the life they never would be able to share.

The officer surprised everyone. Although he maintained that he had not been negligent, he emphasized how awful he felt about what had happened. He was the father of three sons, and he had thought over and over about how he would feel if one of them were killed. He'd asked to be reassigned to desk work, he told the family, because he could not risk being involved in other high-speed chases.

After the meeting, the lawyers tried to turn the discussion to settlement, but the family said they could not think in terms of money, and the parties adjourned. As she left, the victim's sister said, "It's been three years since my brother died, and now I feel he's finally had a funeral."

A week later, their lawyer called to say that they accepted the last defense offer, and the case settled.

We must remember this: As they pursue settlement, clients often feel that they are giving up vital hopes and goals. We lawyers must be alert to the possibility that a litigant who behaves irrationally is reacting to feelings of loss provoked by a deeply difficult decision, rather than engaging in tactical or strategic maneuvers. By helping people grieve for what they cannot obtain, we can help clients in their most vulnerable moments and protect settlement negotiations from unnecessary failure. ▪

# Five Questions, from Eric Galton

1. As a person, how will you be different as a result of this experience?
2. What will be the three greatest lessons learned from the 2020 pandemic?
3. Looking back at your most desperate moments during the pandemic, what's the one thing that helped you get through?
4. How will your mediation practice have changed and will you like it?
5. Complete this sentence. The moment they give us the all clear and social distancing is over, the very first thing I will do is .....