People think that adjudicatory processes are predictable, but they aren’t and the public is figuring that out and moving away from formalistic procedures to mediation.
~ Hon. Wayne D. Brazil (Ret.)

Referring to the results of a 2011 survey of Fortune 1000 corporate counsel, Retired Magistrate Judge Brazil made the above observation during the 2015 advanced training seminar provided by the U.S. District Court/Central District to its panel mediators. The 2011 survey shows that less than one percent of the responding companies espouse an “always litigate” posture, as compared to roughly ten times that percentage in a similar survey conducted in 1997. The 2011 survey also revealed a dramatic drop in the percentage of companies that purport to “litigate first” before moving to ADR. See Thomas J. Stipanowich and J. Ryan Lamare, Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations, 19 Harv. Negot. L. Rev. 1 (2014), available at www.mediate.com/articles/LivingWithADR.cfm. These survey results indicate that those who have had repeat experience with adjudicatory dispute resolution processes (litigation and arbitration) prefer a negotiated, versus litigated, outcome. This is consistent with statistics maintained by the Judicial Council that show that approximately 80% of all civil filings are resolved by means other than a trial on the merits (e.g., settlement, dispositive motion, abandonment). See 2014 Court Statistics Report at 43, www.courts.ca.gov/documents/2014-Court-Statistics-Report.pdf.
Litigating civil disputes in the current environment requires a lot of strategic thinking and planning. It is no longer enough to map out legal theories and the discovery plan to develop evidence to support those theories. It is the rare case that filed today where thought is not given to when—not whether—to go to mediation. Partly due to the broad confidentiality protections afforded by Evidence Code section 1119, mediation has become the preferred method of ADR. Mediation is a facilitated negotiation, and has developed into an ADR process that is uniquely distinct from the settlement conference. The center point of mediation is party self-determination, giving the disputants control over defining both the process and the outcome. The purpose of this article is to examine a few strategies that might help you and/or your clients utilize the mediation process to its best and fullest potential.

Risk is in the eye of the beholder.

People do not perceive or assess risk the same way, and much depends on whether we are facing a gain (selling) or a loss (buying). Generally speaking, in the context of a litigated dispute, plaintiff is selling a claim and defendant is buying plaintiff’s claim. Studies show that the person selling places a higher value on that which is being sold than the person buying. Additionally, some people are more risk averse than others, meaning they will pay more or take less in order to avoid the risk of loss/liability. Others are risk-seekers in the sense that what looks like an unwise gamble to most would look like a gamble worth taking. Risk attitudes of both the parties and their counsel are a subliminal factor in any negotiation, and exert strong cognitive influence on how settlement is viewed as compared to the high stakes and uncertainty associated with litigation.

Researchers have found that a party’s position in the negotiation as plaintiff (seller) or defendant (buyer) influences how risk is assessed. Plaintiffs face a sure gain in settlement versus the possibility of a larger gain at trial, coupled with the potential for complete loss at trial. In the absence of counterclaims, defendants face a sure loss by settling versus the possibility of a defense judgment after trial, coupled with the potential of a significantly larger loss at trial. In one study, the majority of subjects facing gains (seller position) preferred a certain $250 over a 25% chance of $1,000 (worth on average $250). On the other hand, when the same group was put in the position of facing a loss (buyer position), the majority preferred a 75% chance of losing $1,000 (worth $750) to a sure loss of $250. So, the position as plaintiff or defendant is likely to influence each side’s valuation of the case. There is not much anyone can do to avoid completely the influence of risk tolerance in a negotiation, but when an extreme position is taken and held, then you need to spend time working through why one side’s perception of the downside risk is so minimal. The following are some areas where you might test assumptions:

1. Control. Where we believe we have control, we have a lower perception of risk. Travelling by car is a good example. We may feel less comfortable as a passenger than as the driver. For a seasoned litigator with a history of success through trial, the bias may be to try a case rather than resolve it through mediation. Similarly, where the plaintiff controls the decision to settle or litigate, the bias may be to “go to trial” rather than make a counter-offer so as to keep the negotiation moving forward because plaintiff’s initial control over the litigation process may cause plaintiff to underestimate or underappreciate the risk of loss. The influence of the “control” bias is countered by taking the time to critically assess and talk through the various attributes of the trial process that are uncertain and outside the control of the parties and their counsel.

2. Novelty. New risks are seen as higher than ones we have grown used to seeing. For example, genetically modified food is viewed as more risky than pesticides. Continued exposure to the same risk also results in it being seen as less risky. An attorney may be more confident in his/her assessment of the trial outcome in a court or before a judge where the attorney routinely appears versus the situation where the attorney is litigating a case in an unfamiliar court. The same case/same client looks more risky in the “foreign” court. Similarly, a party or insurance adjuster may be more confident in an assessment of the trial outcome where that party has been involved in numerous similar cases versus the situation where being involved in litigating a case of any kind is unfamiliar territory. The novelty bias is countered by delving into the particulars of the case at hand, as well as the representativeness and reliability of the “sampling” from the prior court experience.

3. Risk-benefit trade-off. Behavioral studies show that risk is discounted when there is a perceived benefit as well as a threat. Smoking cigarettes and drunk driving are examples of risk discounting. This factor affects the analysis required for a successful negotiation where the risk of trial is severely discounted because either the defendant focuses on the “benefit” of winning big and paying nothing, or the plaintiff sees only the upside success of the trial and discounts all related risk. This bias is countered by focusing in on the specifics of the perceived benefit, and directly contrasting those benefits with the downside risks.

4. Trust. Where protection from a risk is offered from a trusted party, the risk is perceived as lower, but lack of trust makes the risk seem higher. Public trust in the government, intelligence agencies, and law enforcement can influence the perceived level of threat from terrorism. The client’s confidence in his/her attorney may distort the risk analysis for a given dispute. This is also known as the “halo effect,” and as recent cases have shown, clients have been known to settle (or not settle) with their adversary and then sue their attorney when:
(1) they settle for something significantly less than what they were asking for in litigation and have seller’s remorse, or (2) they pass up an opportunity to settle and then obtain an outcome in litigation that is far worse. See, e.g., Filbin v. Fitzgerald, 211 Cal. App. 4th 154 (2012); Mosa v. Pittullo, Houtzoning, Barken, Abernathy, LLP, 228 Cal. App. 4th 107 (2014); Syers Properties III, Inc. v. Rankin, 2014 WL 1761923 (1st Dist. Ct., May 5, 2014); Amis v. Greenberg Traurig LLP, 2015 WL 1245902 (2d Dist. Ct., Mar. 18, 2015). The simplest strategy for countering the “trust” factor is to coordinate with the mediator in advance to lead the “worst case” discussion and to make sure that the ultimate choice to accept or reject a settlement is left in the client’s hands.

Spectacular achievement is almost always preceded by unspectacular preparation.

Before starting the mediation, time should be devoted to preparing for the negotiation, exploring tactical moves, and setting overall strategic objectives. Fact gathering, developing positions, and devising supporting arguments and materials are essential. Another critical task is to identify the personal and business interests of one’s client and the opposing party. Where do they overlap? Where do they conflict? How many things can you identify and prepare for in advance that your client or the other side might want or need to talk about on the way to reaching a deal? Are some interests more important than others? Are there any “deal-breaker” points and, if so, should they be put on the table at the beginning or end of the negotiation?

Advance preparation pays other dividends. If you (and your client) do this type of work in advance of the mediation, you will not have to work quite so hard at the mediation. Why is that important? Because one of the top reasons why disputes do not settle at mediation is mental fatigue, or too many decisions to be made in a short amount of time on important matters.

The Popeye phenomenon.

Popeye is a cartoon character from the 1950s famous for saying, “I am what I am . . . and that’s all that I am.” The same could probably be said for each negotiator in terms of how he/she perceives the world, interacts with people, and makes decisions. In 1921, Carl Gustav Jung theorized that there are four principal psychological functions by which we experience the world: sensation, intuition, feeling, and thinking. Of these four functions, Jung proposed that one is dominant and influences how we act and think. Katharine Cook Briggs and her daughter Isabel Briggs Myers took Jung’s theories one step further and put the theory of psychological types to practical use through the Myers-Briggs Type Indicator (first published in 1962). The underlying assumption of the MBTI is that we all have specific preferences in the way we construe our experiences, and these preferences underlie how we define and perceive our interests, needs, values, and motivations. Those preferences fall into four broad, general categories: (1) Extrovert—strong-willed, outgoing, social, demanding, determined; (2) Introvert—cautious, precise, deliberate, questioning, formal; (3) Feeling—caring, encouraging, sharing, patient, relaxed; and (4) Thinking—logical, organized, verbal, persuasive, demonstrative.

In addition to their personal “preference behavior,” negotiators can choose from a well-defined range of negotiating behaviors and styles, ranging from competitive to collaborative, compromising, accommodating, and avoiding. Effective negotiators are aware of their natural orientation, take time to observe and identify the orientation of their counterpart, and work to understand the dynamic interplay of the negotiation styles that may be at the table. They are versatile and able to use different styles, depending on the circumstances of the negotiation at hand. For example, if one negotiator’s natural orientation is to problem-solve and look for a collaborative solution, he or she will need to change the usual action plan if the negotiating style of the opponent is competitive. For another example, if one negotiator’s natural orientation is to be competitive, he or she will need to work at being more patient, relaxed, and encouraging if the opponent is an avoider whose negotiating weapon is to not engage and to avoid discussing key issues by diverting the discussion elsewhere. To borrow words from Linus Pauling, “The best way to get a good idea is to get a lot of ideas.”

Negotiation is a dance, but it is not a two-step.

Negotiation is akin to a dance competition where the dancers must be capable of performing more than one dance and switching from different tempos and beats. In the context of negotiating the settlement of a litigated dispute, it is unlikely that either side will be persuaded to adjust its assessment of risk or its evaluation of the merits to mesh with that of the other side on most issues. So, squaring off and arguing “the evidence” or “the law” will not yield a settlement—unless, of course, both are undisputed, but then you would not be in mediation. The party on the undisputed losing end would simply yield. In order to settle a litigated dispute, something more needs to happen and be discussed. And that takes time and patience all around the table. First of all, both/all sides need to have an opportunity to speak, respond, and find some level of common ground. One side may have thought the whole thing through and have a pretty good idea of where the negotiation should end, but the psychological reality is that most people need to engage in a back-and-forth negotiation—they need to dance a little (or a lot)—before they are comfortable saying “yes” to a deal.

A good negotiator understands this aspect of the process and plans out in advance how to engage in a constructive dialogue with the other side, which means identifying a framework within which everyone can agree to discuss settlement. A good negotiator also understands, and comes prepared for, two negotiations: the first being the negotiation that gets each side to its “best” number; the second being the negotiation that bridges the gap. It goes without saying that the higher the level of preparation and communication skills, the faster a negotiation will move. And the reverse is also true. So, wear comfortable shoes and be prepared to dance more than just the two-step.

True genius is the capacity to evaluate and make decisions in the face of uncertain, conflicting, and missing information.

In any negotiation, but especially in the context of the litigated dispute, a negotiator will not have all of the information he/she would like to have. Even in negotiations that occur after discovery has been completed and everyone has a pretty good idea of “the facts” and who they are dealing with on the other side, the negotiator still cannot predict what
the other party will do or how they might react or respond to an offer or counter-offer. Thus, in addition to making and responding to substantive moves, each party must make a deliberate choice throughout the course of the mediation as to whether to make a move that will be perceived and received as competitive versus cooperative. With a competitive move, the party runs the risk of alienating the other side so that it makes the ultimate competitive move of walking out the door. With a cooperative move, the party runs the risk of yielding too much and obtaining a less advantageous outcome than was otherwise available if it had been more competitive. This is the prisoner’s dilemma, and explains why two rational parties might not engage in a cooperative, problem-solving type negotiation, even if, objectively, it is in their best interests to do so.

If parties are thrown into a negotiation or do not prepare in advance and/or do not know or trust the other side, they are going to be more inclined to make competitive moves. When one or both parties have information and know something about each other and both sides of the case, there is less uncertainty and more options, and thus a potential willingness to make cooperative moves; the cooperative player can always return to competitive mode if a cooperative move is not reciprocated. The following are several steps to follow when engaged in a competitive negotiation heading for a stand-off (i.e., impasse):

1. Begin in a cooperative way, but do not risk very much; meaning, do not reveal your bottom line. The point is to get the negotiation going.

2. If the other side comes back competitively, you should “retaliate” and make a competitive move. You need to show that you are capable of being a competitive negotiator, even if that is not your natural style or orientation.

3. If the other side becomes cooperative, you need to be forgiving and play along, even if that is not your natural style or orientation. However, your cooperative moves should be measured (i.e., tit-for-tat), and you should bear in mind that a negotiator who is by nature competitive will only change his or her behavior if it is going to hurt to not do so.

4. You need to be clear on the process (as distinguished from the substance) and on how you prefer to negotiate. You may need to be prepared to negotiate the process with your counterpart, and you may need to adopt a negotiating style that is not your norm.

5. In the event of a stand-off, be prepared to discuss a proposed bracket (e.g., your client will come up or go down to “X” if the other side will go down or come up to “Y”). This is one way to deal with the prisoner’s dilemma because each side knows in advance of its move what the other side’s pre-agreed response will be.

6. Look for opportunities to be creative and find agreement on side issues. Remember, “a pessimist sees the difficulty in every opportunity; an optimist sees the opportunity in every difficulty.” (Winston Churchill)

I like the idea, but I don’t like you.

In the context of the litigated dispute, it is sometimes difficult to formulate a proposal that both parties, given their different interests and views and their conflicting strategic goals, will embrace. Even when such a “mutually-acceptable-in-principle” proposal can be formulated, there may be an additional barrier to overcome: namely, reactive devaluation.

Reactive devaluation is a cognitive barrier in which we automatically reject without consideration that which is said or offered by the other side—even when it is favorable—simply because the source of the message is our adversary or someone we hold in low esteem. This barrier also influences us to reject or devalue whatever is freely available and to strive for whatever is denied (the grass is always greener on the other side). The reasoning that leads to this reactive decision-making is entirely inferential and assumes a perfect opposition of interests or, in other words, a true zero-sum game. That is rarely the case in real world negotiations where parties’ needs, goals, opportunities, risk assessments, or risk tolerances are complex and varied.

Reactive devaluation helps explain the popularity of caucus mediation and use of the mediator to carry proposals between the parties. For some reason, when the proposal is delivered by the mediator—even though it has been sent from the “other side”—it is heard and received differently than if the “other side” delivered it directly. This should encourage you to think strategically about when and how to open settlement discussions. Will the process be easier and will it move more quickly to your client’s desired end point if you conduct settlement negotiations at a mediation versus doing so directly or privately? Abraham Lincoln advised:

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will be business enough.

While sometimes it is necessary to make a little war before there can be peace, parties involved in civil litigation should be provided with the opportunity, encouraged, and empowered to seek a negotiated resolution from the outset of the dispute. As discussed in this article, there is a certain ying and yang to making a deal. Every negotiation is a mixed motive exchange, but no matter how big the pie is, at some point it has to be divided. In negotiation, we have the challenge of managing what are competing voices. On the one hand, we want to compete and claim all the value that we can. On the other hand, we know that if we do not cooperate on some level, we will not reach a deal. These two voices are very different and frequently in conflict. A versatile negotiator is one who is well-schooled in an array of bargaining methods, and capable of translating the two basic negotiating paradigms into a negotiating strategy. As J. Paul Getty once said, “You must never try to make all the money that’s in a deal. Let the other fellow make some money too because, if you have a reputation for always making all the money, you won’t have many deals.”

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Reservation Points: A Perspective on Where the “Real” Negotiation Begins
By Rebecca Callahan

One goal of mediation is to get disputants to the point of having “problem-solving” discussions in the form of exchanging settlement offers. In the context of the litigated dispute where parties are represented by attorneys, the disputants usually come to mediation with a defined range of what they think constitutes a “reasonable settlement” and that range is usually determined by the attorney’s analysis of what he/she predicts the judgment after trial will be discounted by some percentage. For example, plaintiff’s counsel might say that the case is worth between $X and $Y based on prior experience taking such matters to trial and/or based upon research relating to jury verdicts, judgments and settlements of similar such cases, and may believe that the plaintiff has a “good” case defined as a 75% to 80% chance of winning. Defendant’s counsel, on the other hand, might say that the defendant should prevail, but has a 20% to 25% chance of losing and estimates that potential liability could be between $A and $B based on prior experience taking such matters to trial and/or based upon research relating to jury verdicts, judgments and settlements of similar such cases. If you were to graph what the parties’ pre-mediation ranges looked like, it would look something like the following:

\[
\begin{align*}
\text{Defendant's Reservation Point} & \quad \text{Plaintiff's Reservation Point} \\
\text{Opening Offer} & \quad \text{Demand} \\
\Delta & \quad \Delta \\
\] $0 & \quad \text{Opening Demand} \\
\$25K & \quad \$1,000,000 \\
\$300K & \quad \$650K \\
\$900K & \quad \$900K
\end{align*}
\]

This is where the “real” negotiation begins.

It is the rare case where parties’ pre-defined settlement ranges overlap. As a result, settlements achieved during a mediation feel like and are perceived as “compromises” because the parties are required to move beyond their pre-defined reservation points. In the example above, defendant’s reservation point was $300,000 as the most it would offer and plaintiff’s reservation point was $650,000 as the least amount it would accept. It does not too much matter what the basis of each party’s pre-defined reservation point is, the fact remains that their negotiation challenge is to stay at the table and negotiate within the gap between their respective reservation points. Some thoughts about points to be included in that “gap filling” discussion:
There are numerous procedural hurdles that can be put in the path of both parties in the hopes of eliminating some or all of that party’s claims or defenses, or significantly impairing the presentation of their case. All cases have them! Dispositive contingencies are part of each side’s “worst case” analysis. These contingencies can be identified, evaluated and weighed and consideration given to the risk avoided by settlement.

There are sometimes things external to the lawsuit that could affect the value of what is at issue, the finances or stability of one or both parties, etc. These contingencies are frequently the answer to “What could possibly go wrong?” Just like dispositive contingencies, these outside influences can be identified, evaluated and weighed and an adjustment made for the risk avoided by settlement. For example, the impact of avoiding fluctuations in the stock, financial or real estate markets; the impact of avoiding negative publicity about the lawsuit and adverse verdict; the impact of removing a contingent liability from a balance sheet.

Other factors may be difficult to quantify but nevertheless have bearing upon the rational value of a case for purposes of settlement as compared with possibly obtaining a judgment in the future. For example: What is the judge’s track record with respect to the efficient (or inefficient) management of a trial? Does the judge have a known predisposition with respect to summary judgment, jury voir dire, motions in limine, foundational issues, use of scientific information? Has the judge decided similar issues in other cases and, if so, which way did he/she rule? What is the experience or skill level of the attorney(s) on the other side? What is the population from which a jury will be pulled and what biases or prejudices might they, as a group, share in terms of how they might view / identify with or against the parties. And finally, the complete unknown as to who your jurors might be and the complete lack of control over what they do and how they decide a case. All of the foregoing are risk factors. When a risk is avoided through settlement, an is appropriate.

The above discussion points all focus on quantifying the value of risk avoided. We do not perceive or assess risk the same way, and much depends on whether we are facing a gain (selling) or a loss (buying). Generally speaking, in the context of a litigated dispute, plaintiff is selling its claim and defendant is buying plaintiff’s claim. Studies show that the person selling places a higher value on that which is being sold than the person buying. Additionally, some people are more risk averse than others – meaning that they will pay more or take less in order to avoid the risk of loss/liability – and some people are risk seekers in the sense that what looks like an unwise gamble to most would look like a gamble worth taking to the person with an exceptionally high tolerance for risk. Risk attitudes of both the parties and their counsel are a
subliminal factor in any negotiation and exert strong cognitive influence on how settlement is viewed as compared to the high stakes and uncertainty associated with litigation.

Consider the recent decision in the Playboy whistle blower case brought by former senior vice president, Catherine Zulfer. In May 2015, Ms. Zulfer received a $6 million jury verdict under a 2002 federal law that protects whistleblowers. On top of that, the court awarded punitive damages. Playboy was represented by Sheppard Mullin, whom it sued for legal malpractice claiming that an attorney of ordinary skill and capacity would have advised it to settle the case and to demand that its insurer tender the $5 million policy limits. However, according to news reports, Sheppard Mullin very carefully evaluated the case, conducted research and analysis of prior verdicts and settlements, and even conducted a mock jury trial before providing Playboy with a valuation of the case. Based upon the information collected through these activities, Sheppard Mullin evaluated Playboy’s “worst case” scenario as presenting an exposure well below policy limits and rated Playboy as having a 75% chance of prevailing on Ms. Zulfer’s wrongful termination claim. What Playboy appears to have not factored in was the 25% chance of not prevailing, and the caution Sheppard Mullin most certainly gave its client that juries are unpredictable, especially with respect to their handling of emotional distress and punitive damages – both of which were awarded in this case. There are no reports of what was or was not offered or demanded in any pretrial negotiations between the parties, but it is probably safe to assume that Ms. Zulfer’s opening demand was above policy limits and that Playboy’s final offer was well below the $5 million policy.

Calling attention to the Playboy case is not intended to be critical of Playboy or its counsel but, rather, to call attention to how much influence a defined reservation point may have on a party’s perception and/or understanding of its downside risk and how that may in turn influence the party’s attitude about and approach to settlement. It also shows the importance of reassessing the value of a case for purposes of settlement once the gap between the parties’ respective reservation points has been reached – the assumption being that a settlement was attempted in the Playboy case and the parties got stuck around the policy limits figure (with Ms. Zulfer at or above policy limits and Playboy well below). Finally, it illustrates the importance of managing a client’s expectations, and interjecting that management oversight periodically as the case develops.

When the reservation-point-gap is reached, the question at that point is not so much “Is this a good deal on the table that I should accept?” but “Will I regret not staying at the table and making a further effort to settle if the worst case turns out to be worse than estimated?” This is a very uncomfortable discussion to be had, for sure, but it is equally uncomfortable all around the table! Movement in this zone is both difficult and uncomfortable. However, in this changing climate where attorneys are being sued for “settlement malpractice” – both for recommending

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1 To the contrary, based on what has been reported concerning counsel’s efforts to assess Playboy’s potential exposure, it would appear that they appropriately told the client that there was risk and that they made a concerted effort to approximate the client’s worst case based on the information then available in terms of prior judgments and verdicts.
or not recommending settlement – it is a discussion that needs to be had. This is especially true since a foundational underpinning of mediation is *party* self-determination, meaning that it is the party (not the attorney) who should make the ultimate decision to or not to accept a settlement and thus take ownership of that decision.
Plan for Success - Party/Counsel Preparation Checklist

Setting the Table:

Give advance consideration to who needs to be at the mediation for your side:

- To tell the story
- To explain the theory of the case
- To talk numbers
- To make “in game” adjustments
- To make the ultimate decision re “deal” or “no deal”

AND

Give advance consideration to who might / should be at the mediation from the other side and assess what you know - and don’t know - about them in terms of power, resources, bargain style, bargaining authority, negotiating tactics, reputation.

What’s Your Message / What’s Your Goal / What’s Your Plan?

Define your objectives and do so broadly:

- What information do you want to give to the other side?
- What information do you want to get from the other side?
- What information does the other side need to see the problem and the solution your way?
- What is your negotiating objective?
- What are the risks you are seeking to avoid? And how would you quantify them?
- What is your plan on how to get the other side to give you what you want?
- How do you think the other side will respond? And what’s your response to that response?
- What are you willing to give up to achieve your negotiating goals? To avoid the perceived / quantified risks?
**What Does the Other Side Want and Why?**

What do you know about what the other side wants and why they think they are entitled to that outcome?

- What information do you need to understand where the other side is coming from in terms of their view of the problem and the solution?
- What information do you have that might prompt an adjustment by the other side?
- What do you anticipate will be the other side’s negotiating plan?
- What is your plan re how to get the other side to move away from their position?
- What do you think the other side might be willing to give up get something they want?

**What Does it Mean to Say “No” Without a Counter?**

- What’s your client’s true / most likely alternative outcome court?
- Does client fully appreciate the risks of litigation? No guarantees? *Someone* is going to lose at trial?
- What is the potential magnitude of an adverse judgment? And can your client weather such an outcome?
- Is there exposure for the other side’s attorney’s fees? Significant costs?
- How confident are you about the predicted judgment value?
- What is the consequence to the client if that outcome is not achieved?

*Handout re Playboy*
*Handout re Kiser Study*
*Handout re Reservation Points*
Plan for Success

❖ Should the start of the mediation be staggered?
❖ Should the mediation be staged in two or more sessions?
❖ Is there a “headliner” issue that needs to be dealt with first?
❖ Are there tax or compliance or insurance or other “specialty” issues that may need an expert at the table in order to make progress?
❖ What can the mediator do to help get dialogue going?
❖ What can the mediator do to help get the case settled?
❖ What information does the mediator need to carry messages or facilitate settlement negotiations on your behalf?

Party & Counsel Substantive Preparation

❖ Explain to the client what the process is about – facilitated settlement negotiation; not a hearing on the merits
❖ Discuss and agree upon roles as between disputants, counsel and other participants
❖ Outline what the case is about from your perspective
❖ Consider and contrast how you think the other side sees the dispute
❖ Is there any common ground / shared issues or objectives?
❖ Outline and prioritize your negotiating goals and assess what's in it for the other side
❖ What is it that you think the other side wants and is there anything you'd be willing to give them?
❖ Outline and prioritize what you want to have discussed relative to the dispute
❖ Analyze your best case scenario and best NET recovery
❖ Analyze your worst case scenario and don’t forget to factor in liability for prevailing party costs of suit and maybe even attorney’s fees
❖ Analyze the time, dollar and lost opportunity cost of resolution in the courts – Is there something else your client would do with its time, money and resources that would produce greater value than what can be obtained through the litigation? Look at the litigation as an investment or a loss prevention strategy and ask whether it pencils out.
Read the other side's brief (if shared) and outline a response

Develop a multi-step negotiating plan and be prepared to tie reasons to any and all proposals

Practice and prepare your opening presentation - even if just to the mediator - what is it there you’re pitching the mediator for? What is it that you want or expect the mediator to do with the information you include in your presentation?

Give consideration to what roles you might want the mediator to play - with you or with the other side
Abraham Maslow has been credited with saying, “If the only tool you have is a hammer, you tend to see every problem as a nail.” Underlying this observation is, of course, an invitation to reach beyond our comfortable perspectives and to take a fresh look at the problems that we are trying to solve. While none of us would deny the wisdom of this ideal, many of us spend our lives hammering away at the same old problems in the same old way. This is because we often know of no other way until something makes us take notice. As the saying goes, “you don’t know, what you don’t know.”

Recently, I had the opportunity to attend a course in mediation training offered by the Straus Institute For Dispute Resolution, through the Pepperdine University School of Law. For those of you imagining attending class at the beautiful campus in Malibu, California, I had no such luck, as the course I attended was offered in Washington, D.C. While the sand and surf would have been nice, the chance to appreciate the different aspects of the mediation process through the eyes of the mediators teaching the course was wonderfully edifying all by itself. Upon reflection, what struck me most was a new awareness of the many choices that are made, whether mindfully or not, when a dispute is mediated. Seen from the perspective of the mediator, each new choice presents an opportunity to meaningfully influence the process. This paper shares some of the issues you should consider when deciding how your mediation should be conducted.

**MEDIATOR STYLES AND SELECTING AN APPROACH THAT MEETS YOUR NEEDS**

The risk when considering mediator styles is to over simplify because an effective mediator will undoubtedly employ numerous approaches when attempting to facilitate a settlement between the parties. Nonetheless, understanding the paradigmatic approaches and any particular mediator’s tendencies will be instructive when shaping a process to meet the particular challenges presented by your dispute.

Law Professor Leonard L. Riskin developed a model to depict the basic approaches to the mediation process that is referred to as Riskin’s Grid, which is set forth below as Figure 1. Leonard L. Riskin, Who Decides What? Rethinking the Grid of Mediator Orientations, Dispute Resolution Magazine, Winter 2003 at 22–25. The grid is formed at the intersection of the continuum addressing the role of the mediator (ranging from evaluative to facilitative) and the continuum addressing the mediator’s defini-
tion of the problem (ranging from a narrow position based approach to a broad interest based approach). While Riskin’s more recent scholarship suggests alternative grids to deal with more nuanced considerations, the basic model is a worthwhile reference when determining which mediator orientation is best suited to resolve your dispute. Id.

(Figure 1) Orientations

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<tr>
<th>EVALUATIVE</th>
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<tr>
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Evaluative v. Facilitative Orientations

The evaluative approach has also been referred to as directive. Id. An evaluative mediator is commonly seen as the “head banging” type that will push the parties toward resolution. Typical of this approach, the mediator may inject his or her own assessment of the strength and weaknesses of the issues being addressed and predict outcomes. To some, the influence exerted by an “evaluative” mediator stands at odds with the principle of party self-determination under girding the mediation process. Id. You should expect the evaluative mediator to be very influential in the process and its outcome. When weighing the suitability of this approach in your mediation, you should consider whether your position can withstand the scrutiny of the mediator and whether your negotiation team is equipped to handle that type of pressure.

By contrast, facilitative or elicitive mediators seek to advance the process by helping the parties to make their own evaluations of proposals and assessment of risks. Id. The parties are assisted by a mediator ready to ask each party the probing questions, but reluctant to provide his or her own assessments. A facilitative mediator will allow the parties greater self determination while serving as a learned guide throughout the process.

When deciding if an evaluative or facilitative mediator is the correct fit for your dispute, critical thought should be given to how increased party influence will affect the likelihood of reaching an acceptable negotiated result. This analysis will turn heavily on your assessment of the business acumen and ethos of the negotiating teams, both the parties and the lawyers, participating in the process. A facilitative mediator probably is not appropriate if you believe your opponent is likely to attempt to seize the moment by steamrolling all of the participants, including the mediator. Conversely, an evaluative approach is more conducive to a circumstance with an opponent who is likely to perform a reasoned case assessment and negotiate on that basis.

An often overlooked consideration when selecting a mediator is the mediator’s own view of his or her role in the process. Does the mediator believe that his or her essential purpose is to obtain a settlement? If so, be prepared to have some pressure applied if the opposing participant remains unyielding. Alternatively, is the mediator’s aim to support sound decision making, first and foremost, leaving the settlement as the parties’ responsibility? As with all approaches that emphasize party self determination, a consideration of this style should include whether or not the parties involved in your mediation (including your own negotiating team) are likely to respond well to having greater influence in the process.

Narrow Problem Orientation v. Broad Problem Orientation

An important factor that influences a mediator’s orientation is their definition of the problem. In Riskin’s Grid, the question of problem definition is presented by establishing a continuum ranging from narrow to broad. Id. A narrow conception
of the problem begets a process that proceeds “in the shadow of the law” with the parties’ legal rights central to the debate. At the other end of the spectrum, a broad definition of the problem plumbs the parties’ interests beyond the legal question presented by the immediate circumstance. The parties are viewed against the wider vista of their relationship to each other and the marketplace or community within which they participate. Care should be taken when framing your mediation as to which view of your dispute would promote the best resolution.

**BARGAINING MODELS FOR CONDUCTING A MEDIATION**

Dispute resolution theory contrasts two bargaining models. The most familiar of these approaches is referred to as distributive or competitive bargaining. As the name suggests, this process involves each party seeking an advantage by maintaining a position that allows it to obtain the better part of a fixed sum. The opposing model is integrative or cooperative bargaining in which the possibility of a negotiated solution is sought beyond the parties’ opposing positions on a particular issue. The dispute is recast against the broader context of the parties’ interests, with less immediate emphasis placed upon the parties’ differences. As most negotiations will involve elements of each of these bargaining methods, it is important to appreciate the subtleties of each.

**Distributive (“Competitive”) Bargaining**

In a distributive negotiation, the parties distribute between or among themselves the value being negotiated. In the context of commercial litigation, a distributive negotiation is often conducted concerning a monetary sum associated with the parties’ respective responsibility for a particular legal problem. Distributive bargaining is characterized by competitive maneuvering to obtain the most advantageous position allowable with respect to the relatively fixed subject of their negotiations. Inherent in the distributive bargaining process is a tension between the competition generated by the “zero-sum” exchange and the desire to cooperate in reaching a solution of the problem. A successful negotiator recognizes the tension between competition and cooperation and manages it by being mindful of the dynamics of distributive bargaining and the tendencies of the participants in the particular negotiation.

There are a few operative principles that all negotiators must be aware of when engaged in distributive bargaining. The primary principle is that the matter tends to settle at the midpoint between the first two reasonable offers. Given this dynamic, it stands to reason that opening offers are critical in establishing the settlement bracket. A solid opening offer or “anchoring position” can go a long way toward determining the success of the ensuing negotiations. The best opening offer will be seen as credible, but without conceding more than is necessary to motivate the other party into making a credible counteroffer.

Equally important is the ability to choreograph the exchange of concessions building toward the final settlement amount. How to precisely plan your moves depends, in large measure, on the parties involved in the negotiation. Yet, there are certain negotiating norms that should inform your thought process. As an initial matter, always remember that the parties expect to exchange several offers. Any effort to circumvent the anticipated bargaining process by making a “fair” offer early will be interpreted as another step in the process and an opportunity to seize additional concessions. Further informing the pace of the negotiations, unless there is a specific deadline, the time taken between concessions increases as more concessions are made and the size of each successive concession becomes smaller. Professor Peter Robinson of the Straus Institute For Dispute Resolution was particularly engaging on this point by explaining to prospective mediators in the class that there are expected steps in this dance and that failing to honor them only causes a party to step on its own toes. Rather than being put off by a process conceived by some as antagonistic and coarse, he encouraged his students to revel in the sound of the “mariachi music” as the steps of the dance unfolded.
**Integrative (“Cooperative”) Bargaining**

The concept underlying integrative or cooperative bargaining is to assist the parties view their dispute in a broader context. Consideration is given to the parties’ interests beyond the resolution of the issue(s) presented by their dispute. Understanding a party’s broader interests presents each party with the opportunity to satisfy the other’s needs without necessarily making a concession of their own. Reaching a negotiated solution is no longer a zero-sum game. Instead of a competition pitting the parties in a battle over a defined issue, the focus is expanded by inviting the parties to consider alternative ways they can create value for each other without necessarily losing in that exchange. In theory, the competition animating distributive bargaining is replaced by a more cooperative model where the parties can increase the possible benefits to be shared, while also increasing the likelihood of reaching a negotiated settlement.

The integrative bargaining process begins with an effort to create a list of the interests underlying each party’s negotiating stance on the defined issues. The mediator also accounts for the parties’ overarching needs as presented by the commercial circumstance. A skilled mediator is invaluable at identifying interests that lie below the surface of the dispute. Dispute resolution theory refers to these interests as the “below the line” interests. Fertile areas to examine include the value the parties ascribe to: (1) their relationship; (2) their standing in the industry or business community; and (3) the principles at issue in the dispute to be decided. After defining each party’s interests in a negotiated solution, the varying means of satisfying these needs are explored during discussions with the parties.

The benefits of integrative bargaining are most readily realized when the parties value an ongoing relationship. Relatedly, the success of an integrative approach relies on capturing or developing trust between the negotiating parties. Attempts at innovation almost always rest on the ability of the parties to trust each other. For surety professionals, situations where maintaining an ongoing relationship is at a premium include: (1) negotiations to takeover and perform a project; (2) disputes on an ongoing project; and (3) a dispute with a principal who the surety has bonded on other projects. Even if your project does not appear suited toward integrative bargaining, underlying interests should not be ignored because creative negotiators can oftentimes gain some advantage by utilizing interest-based techniques.

**TECHNIQUES FOR BREAKING THE IMPASSE**

A mediator’s skills are most ardently tested when the parties’ negotiations reach an impasse. As the frustration between the parties rises, a mediator’s ability to instill hope, supply energy and present new approaches, is essential. Indeed, it is at the point of impasse, when the credibility established by the mediator throughout the process needs to be leveraged into results. Set forth below are some oft used mediator techniques for jump starting negotiations that are stuck.

**Narrow The Gap By Proposing Linked Moves**

Parties are often reluctant to move toward their bottom line position out of a concern that a further concession will be interpreted as a lack of resolve and thus, will fail to garner a corresponding move from their negotiating partner. In this circumstance, the mediator can bridge the gap by proposing linked moves. While there are many variations of this technique, the purpose is to gain further concessions from each party by establishing the value of the corresponding moves. Dwight Golann, *Nearing the Finish Line: Dealing with Impasse in Commercial Mediation*, Dispute Resolution Magazine, Winter 2009 at 4–10. When effective, a new narrower bracket is established as the basis for further bargaining. Id. This mediator strategy is often implemented through the use of hypothetical questions posed to the parties in their separate caucus rooms. “What if?” questions are used to obtain a commitment, which should a certain offer be forthcoming, an agreement could be struck or a contemplated simultaneous move would then be made. Id.
Revisiting The Litigation Risks

One of the essential benefits of a mediated solution is that the parties retain control over the resolution of their dispute. Suffice to say, this element of party control is ceded to others when a case is submitted to litigation or arbitration. While this concept is usually presented by the mediator in the convening or opening stages of the mediation, the value of party self-determination and the attendant risks in trying the cause are often lost in the tussle of competitive bargaining. At the point of impasse, the parties are toing up to the edge of the “litigation cliff” and it is the mediator’s job to remind them of the risk of jumping. This is the point in the mediation were a stark review of the litigation risks will be most instructive.

Professor Jim Craven of the Straus Institute, refers to this review of the litigation risks as the “Parade of Horribles.” A review of the risks of litigation can include: (1) the uncertainty of the result; (2) a review of the legal and expert costs; (3) a discussion of the lost opportunity cost associated with management’s involvement in a time consuming and emotionally draining dispute; and (4) the reputation costs associated with the litigation itself and a possible adverse outcome. Professor Craven offers an interesting variant on this approach whereby he encourages the parties to visualize life without the emotional torque of the pending dispute. Anyone familiar with the trials and tribulations of litigation will immediately appreciate the power of this approach.

Restructuring The Mediation

The dynamics at work in a caucus room during a protracted mediation session vary based on the differing personalities comprising the negotiating team. Having spent a good deal of time locked away in caucus rooms as a party advocate, I can attest to one constant – emotional strain. The mediation process forces parties to uncomfortably relive their dispute. The rigors of distributive bargaining can further fracture already broken relationships. Moreover, the anxiety and emotion expended in the bargaining effort exhausts many participants.

A skilled mediator is a student of interactions throughout the mediation process. The mediator will be studying both the exchanges between the parties and the interaction among the members of the separate negotiating teams. As the process unfolds, the mediator develops impressions as to which participants are advancing the possibility of reaching an agreement and which individuals are detrimental to the process. At the point of impasse, the mediator can restructure the mediation to refresh and reinvigorate a process that has ground to a halt.

There are many options a mediator has when restructuring the process to mine fresh perspectives and create new opportunities for a breakthrough. Id. Options for restructuring the process include: (1) adding participants to, or subtracting participants from, the process; (2) having the key decision makers from each side meet together without their respective negotiating teams; (3) inviting the opposing lawyers and/or experts to meet apart from their clients; and (4) convening a new joint session to address a narrow impasse issue. Id.

A Mediator Proposal Or Case Assessment

A powerful tool in the mediator’s arsenal is the mediator’s proposal or case assessment. As with many of the techniques discussed herein, there are numerous ways this approach can be implemented. A mediator utilizing this technique can go as far as proposing final settlement terms for the party’s consideration. Other related options include a mediator’s assessment of a particular impasse issue or a mediator’s overall assessment of the likely outcome of the dispute if litigation is pursued. Dwight Golann, Nearing the Finish Line: Dealing with Impasse in Commercial Mediation, Dispute Resolution Magazine, Winter 2009 at 4.

Use of this impasse breaker warrants particular consideration. An essential feature of the mediation process is party self-determination. A mediator, imbued with authority by virtue of his or her selection and role in the process, exerts substantial influence over the outcome of the negotiations when mak-
ing a proposal. Accordingly, the parties’ desire to have the mediator provide a proposal or case evaluation in the event of an impasse should be considered during the convening or opening stages of the mediation. Understanding whether or not a mediator’s proposal or case assessment may be forthcoming can influence a party’s decisions throughout the process, including the disclosure of confidential information.

Mediation will not always result in a global resolution of the parties’ disputes. When an overarching agreement is not reached, effort can be directed at reaching smaller agreements. Even if parties are not ready to resolve the entire matter, they may agree to a streamlined dispute resolution process or an agreement to exchange information and resume negotiations at a later time. When an agreement cannot be reached, deciding whether the process was worthwhile is informed by the party’s own mediation philosophy. Was the process just about achieving a settlement or was it about making informed decisions in the handling of a dispute?
Advising Clients on the Value of a Case

Let’s Not Make a Deal

By Susan M. Hammer

The settlement discussions concluded with plaintiff demanding $1.8 million, the defendant offering $1 million, and neither side willing to budge. The case went to trial, ending with a $1.4 million verdict and each side improving their position. According to a recent study published in the Journal of Empirical Legal Studies, this was a relatively rare event.

In just 15 percent of all cases, both sides better their position at trial – that is, the plaintiff is awarded more than the defendant offered and the defendant paid less than the plaintiff demanded. In 85 percent of all cases that went to trial, one or both parties were worse off by rejecting the last settlement proposal.

This fascinating study included 2,054 California civil cases decided between 2002 and 2005. The purpose was to determine whether, and under what circumstances, the parties did better at trial than they could have with settlement. In 61 percent of all cases, plaintiffs did worse. On average, their decision error cost $43,000. The frequency of defendants’ decision error rate was lower (24 percent), but the magnitude of error was greater. On average, getting it wrong cost defendants $1.1 million. These figures include awarded costs and attorneys fees.

Certain types of cases had higher settlement error rates. The researchers found that plaintiffs had higher decision error rates where contingency fee arrangements are common, such as medical malpractice cases (81 percent) and personal injury cases (53 percent). In contrast, plaintiffs’ decision error rate in contract cases was 41 percent. On the defense side, decision error rates were highest in cases where insurance coverage is generally not available; for example, 44 percent in contract cases and 40 percent in fraud cases. Lower decision error rates were associated with cases where insurers were more likely to represent the defendant, such as premises liability (17.5 percent) and personal injury (26.3 percent).

Here’s the kicker. The authors of this study have surveyed trial outcomes for the past 40 years. Even with availability of jury verdict information, the frequency of settlement (95 percent plus) and the attention given to risk analysis, decision error rates were more frequent in 2004 than in 1964. Of course, this does not mean that our profession is getting it wrong in the 95 percent-plus cases that do settle. We simply have no basis for comparison in those cases.

Advising clients on the value of a case — when to hold ‘em and when to fold ‘em — is something lawyers do well every day. The study provides us with the opportunity to reflect on the reasons why cases do not settle and the costs and benefits associated with those decisions. Here are a few observations about how we might do better.

The Price to Pay

In the real world, settlement decisions are based on many factors other than economic efficiency. There are extrinsic factors that cause parties to sacrifice the optimal economic outcome in favor of a compelling, non-economic need. A party may put a premium on having his or her day in court, setting a precedent, sending a market signal, punishing or needing to “bet the company.”

There is nothing inherently wrong with considering extrinsic factors so long as it is clear that pursuing them may come with a substantial price tag. Attorneys may have varying degrees of influence over client decisions, but at the very least, they can advise and hope their client will listen. I’d also suggest asking your mediator to help you work with a client who is having a hard time balancing the tradeoffs.

Manage Your Clients’ Expectations

Lawyers need to work from day one on managing their clients’ expectations. When plaintiff’s counsel writes a demand letter that includes unrealistic theories and exaggerated numbers, and defense counsel responds, offended at the suggestion of liability and describing the claims as frivolous, there’s a risk the client might take the lawyer’s position literally. The client may not understand that aggressive advocacy is one thing and case evaluation another. When each side then writes a letter to the mediator giving an unrealistic settlement range, the client might come to mediation unwilling to consider a number outside it.

The plaintiff may first realize at mediation that their chance of getting a
$1 million verdict is about 5 percent, and a defendant may hear, for the first time, that their chance of getting out on summary judgment is about 5 percent. The client may feel betrayed by the attorney ("whose side are you on?") and the lawyer may feel their client is being irrational. Attorneys can save their client relationships and have an easier time managing expectations if they use caution from the beginning, by talking about evidence that may surface during discovery or mediation that could change the risk assessment and by explaining the difference between an initial advocacy letter and a settlement analysis.

Vet Your Case to Someone Who has a Different Point of View

The most successful lawyers vet their case with seasoned practitioners in order to get a balanced view. When counsel seek out only like-thinking colleagues, they tend to get an overly optimistic view. It may be comforting in the short run but ultimately not helpful.

Give the Same Attention to Dispute Resolution Advocacy as to Trial Advocacy

Litigators go to CLE programs on deposition techniques, cross-examination techniques, offering evidence, voir dire, and closing arguments. Although almost all cases will settle, attorneys generally have less training in dispute resolution advocacy. Some come to mediation and repeatedly present some version of their closing arguments. The best dispute resolution advocates come to mediation ready to learn something new and to thoughtfully analyze cost, risk, opportunity and non-economic factors. They are a counselor. Their clients are prepared to see their lawyers play a different role than they would at trial, and they are ready to appreciate it.

In 2014, this study will likely be done again. Will it show that, as a profession, we are helping our clients get better at knowing when and how we should “make a deal”? Time will tell. In the meantime, how can we counsel our clients to make the best decision possible?

Susan Hammer is a Portland-based mediator, focusing on business, employment, professional liability and injury cases. She has mediated for over 20 years. She is a distinguished fellow in the International Academy of Mediators and is listed in Oregon Super Lawyers and The Best Lawyers in America for Alternative Dispute Resolution.

Endnote


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**Decision Errors and Cost of Error**

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**Negotiations in Unsuccessful Settlement Negotiations** by Randall L. Kiser, Martin A. Asher and Blakeley B. McShane. It can be found at http://www3.interscience.wiley.com/cgi-bin/fulltext/121400491/PDFSTART
When it comes to mediation, counsel typically adopt a well-worn approach. They author persuasive briefs, craft effective presentations, and calculate settlement targets — all rooted in the righteousness of their client’s position. But at this juncture, prudent counsel also need to take a moment to pause their advocacy to fully and objectively calibrate their assessments. This will assist their clients in making the informed, tactical decision of whether to settle or proceed to trial. In other words, counsel should accurately and thoroughly advise clients of what often seems inconceivable at the time: The judge or jury may find against the client.

Be it plaintiff or defendant, counsel that overlook or underestimate this innate, ever-present risk do so at their own peril, and may invite unintended consequences. The recent allegations advanced by Playboy Enterprises Inc. against Sheppard, Mullin, Richter & Hampton LLP serve as a cautionary reminder about overestimating a client’s odds at the so-called courthouse casino.

In April, Playboy filed a professional malpractice action against its former litigation counsel, Sheppard Mullin, in Los Angeles County Superior Court. The magazine company seeks at least $7.6 million in damages. Playboy contends the law firm exposed it to millions of dollars of damages by encouraging Playboy to take an underlying wrongful termination action to trial rather than advocating for settlement.

According to the complaint, Sheppard Mullin defended Playboy in the underlying lawsuit brought against the company by a former employee. Playboy alleges it was motivated to proceed to trial because the law firm advised (1) Playboy had a 75 percent chance of defeating the claims; (2) only one-third of mock jurors found against Playboy; and (3) Playboy’s exposure was less than $3.5 million. Notwithstanding Sheppard Mullin’s predictions, Playboy allegedly lost “in speculator fashion” and the jury returned a verdict of $6 million in compensatory damages, plus an entitlement to punitive damages and attorney fees.

Post-trial, Playboy negotiated a settlement with the plaintiff that “left a liability well in excess of the [insurance] policy limit.” Playboy alleges it was not properly informed of the risks of an adverse jury verdict. Playboy also alleges the law firm failed to recommend that Playboy accept two earlier settlement demands by the plaintiff that were within the company’s insurance policy limits, instead giving rosy projections about what would occur at trial.

Sheppard Mullin has publicly denied the claims and has asserted it expects vindication. It surely has a different assessment of the events leading up to trial, and the firm is likely to vigorously defend against the malpractice claim. The case is at the preliminary stages, and observers will have to stay tuned to see whether either party emerges as the victor, or perhaps a sensible settlement is achieved.

Regardless of the outcome, one principle remains plain. The allegations in the Playboy lawsuit are an admonition that any attempt to calculate the probability of a favorable versus an unfavorable litigation outcome is prone to error, and poses hazards to counsel endeavoring such divinations. Indeed, in a 2010 study of the ability of litigators to predict the outcome of their own cases, researchers concluded that litigators are systematically overconfident and poor forecasters, more prone to self-bias and wishful thinking than acting as professionals.

These cautions exist regardless of whether one sits on the plaintiff or defense side. A bullish expectation of a future recovery that results in a defense verdict may leave plaintiffs — who were banking on a payday — feeling less than satisfied and believe they were led astray by their counsel; equally true, defendants who forewent settlement and proceeded to a losing trial may target counsel. And such cautions should be taken soberly by counsel, as professional malpractice cases pose the danger of severe financial consequences, reputational harm, and unflattering press coverage — the trilemma of litigation pain.

So what are the chief takeaways for litigation counsel preparing clients for mediation or other settlement discussions?

Counsel should remain mindful that there is no precision in trial work and may want to adopt these prophylactic measures:

1. **Leave the odds for Vegas.**
   Astute counsel should repeatedly remind clients that litigation is inherently unpredictable, and memorialize that advice in writing. Even using mock juries, hired consultants, and prior trial experiences, skilled counsel may be ill-equipped to predict how any specific judge or jury will respond to a certain set of facts and arguments. While counsel often are solicited to provide such predictions, any prognostication should come with the caveat that no counsel has a crystal ball. Judges and jurors think differently. An experienced, unbiased mediator — intimately familiar with the “house” — can supply invaluable insights in this regard.

2. **Settlement has the benefit of control.**
   Even the most confident of counsel should remain ever heedful of the non-pecuniary benefits of settlement. Notably, the client is able to control his, her or its own destiny and not leave it in the hands of an overworked, harried judge or the vagaries of pooled strangers from all walks of life. Also, a major distraction is removed and the client can turn his thoughts and labors to more worthwhile professional and personal pursuits. Further, settlements can remain private, the lengthy trial and appeals processes are shortcut, and the considerable costs of motion practice, discovery and/or trial are saved and can be invested into more profitable ventures. While some of these aspects may not readily lend themselves to a dollar value, counsel should stress the considerable value of such advantages.

3. **Have the carrier pull up a seat.**
   Insured clients that have tendered their defense to the insurer may be in a special position in light of certain rights they may have against their insurer given a particular settlement demand. The nuanced possibilities of conflicting interests that may arise is beyond the scope of this piece, but the key lesson is that counsel should be mindful to have the carrier at the table.

Even the most measured of lawyers may face malpractice lawsuits from disgruntled clients. But lawyers can protect themselves and minimize risk.

Next time a client asks, “What are my odds?” remember a trial remains a game of chance and often with no second bets. And both winning and losing is a part of gambling and fully inform the client, in writing, of all the costs and benefits of a certain settlement versus an uncertain trial.

**Hon. Jay C. Gandhi** is a U.S. Magistrate Judge for the Central District of California, a Vice-Chair of the Court’s Alternative Dispute Resolution Committee, and a former Co-Chair of the Alternative Dispute Resolution Committee of the American Bar Association’s Litigation Section.
The AAA provides mediators to parties on cases administered by the AAA under AAA mediation procedures. Mediations that proceed without AAA administration are not considered AAA mediations, even where parties select a mediator who is a member of an AAA mediation roster.
E-DISCOVERY DISPUTES including those involving preservation duties, scope, proportionality, privilege, clawback, and sanctions.

EMPLOYMENT DISPUTES, such as breach of contract, discrimination, wrongful termination, wage and hour, and key man non-solicitation and non-competition agreements.

REAL ESTATE DISPUTES, such as landlord/tenant (commercial), lease interpretation/performance, partition, scope of lien/lien priority, specific performance, wrongful foreclosure, and loan modification / short sale rights and obligations.

WILLS AND TRUST TRUSTS: accounting disputes, beneficiary disputes, breach of fiduciary, challenges to the validity of the will or trust instrument, instrument interpretation, financial elder abuse, conservatorship issues.

For more information, please visit Ms. Callahan's website and blog at www.callahanADR.com.

Experience as a Mediator

Has mediated over 750 disputes, many of which involved contract interpretation, accounting, asset valuation, asset tracing, and title/ownership disputes, as well as claims of fraud, breach of fiduciary duty, mismanagement, interference, aiding and abetting, and negligence. Examples include:

Mediator in numerous commercial disputes involving breach of contract, fraudulent inducement, mistake, force majeure defenses, warranty issues, insurance coverage issues, contract interpretation, accounting, asset valuation, asset tracing, and/or title/ownership disputes.

Mediator in numerous business tort disputes involving fraud, misappropriation, breach of fiduciary duty, mismanagement, unfair competition, trade libel, interference, aiding and abetting, and/or general negligence.

Mediator in numerous business separate/succession disputes, such as partnership dissolution, accounting and division of assets, orderly liquidations, out-of-court and in-court restructurings and forced buy-sell.

Mediator in numerous real estate disputes (residential and commercial) involving financing, lien priority disputes, purchase/sale, foreclosure, development, leasing and bankruptcy.

Mediator in numerous bankruptcy disputes, including objections to discharge, challenges to plan confirmation, classification of claims, preferences, fraudulent transfers, property belonging (not belonging) to the debtor's estate, plan implementation and "related to" litigation affecting the debtor and/or its bankruptcy estate.

Mediator in over a dozen employer/employee disputes involving discrimination, hostile workplace, wrongful termination, disability accommodation, and breach of
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Neutral ID : 154074

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Representative Issues Handled as a Mediator

- Duty Issues- defined by contract; imposed or implied by law; undertaken by status as an attorney, broker, officer, director, partner, managing member, employer, employee, agent or representative.

- Money Issues - accounting for money; tracing the use or disposition of funds or other assets; assessing the monetary value of property, goods, services or other benefits bestowed or received; assessing the monetary value for loss of or damage to tangible or intangible property/property rights; understanding the current or historical financial condition of a business or business venture.

- Conduct Issues - negligent acts and omissions; tortious conduct in the form of fraud, trespass, misappropriation, infringement, conversion, transfer and concealment of assets; unfair business conduct in terms of not performing as agreed or engaging in conduct aimed at obtaining an unearned advantage or unjust enrichment.

- Valuation Issues - assessing the value to be ascribed to real or personal property, goods, services or other benefits received or bestowed; assessing the value of a partial ownership interest in property, a business, a trust or other assets.

- Offset Issues - assessing the effect of competing claims.

Years of Practice as a Mediator
17

Total Number of Cases Mediated
750

Mediation Experience as an Advocate or Party

Represented a Japanese manufacturer and its United States subsidiary in a multi-million dollar dispute concerning the power of attorney and performance guaranty provisions of a master agreement with the bank who provided financing for leases and purchases of laser eye equipment. A three-day mediation was convened and a settlement was achieved which resolved the guaranty liability related to the lease portfolio of approximately 100 leases, of which about 80% were in default.

Represented a regional hospital in a dispute with MedPartners concerning amounts allegedly owed after reconciling the "risk pool" for a capitated care arrangement involving several health care insurers and their enrollees. The hospital claimed it was owed $10 Million. MedPartners claimed that the hospital had been overpaid and owed it $7-8 Million. A one-day mediation was convened. While a settlement

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was not achieved at that time, the case did settle after discovery and before trial.

Represented a child prodigy artist in a dispute with her publisher concerning ownership of a warehouse full of limited edition works of art and millions of dollars in unpaid royalties. A mediation was convened and a settlement was achieved which resolved all disputes and returned all art work to the artist.

Represented a property management company and its on-site apartment manager for a large apartment complex in a discrimination / unfair housing practices complaint by a tenant family. A mediation was convened and a settlement was achieved which resolved all disputes and resulted in dismissal of the lawsuit.

Represented a temporary personnel staffing company in a dispute with its Worker's Compensation Insurer concerning amounts allegedly due under a retrospective rating plan for a workers' compensation and employers liability policy, along with an unjust enrichment claim seeking money damages for the benefit provided to the staffing company through the insurer's processing and payment of employee claims during the policy period. The dispute also involved an alleged successor entity to the staffing company. Two mediation sessions were convened and a settlement was achieved which resolved all disputes and resulted in dismissal of the lawsuit.

Represented an elderly person in a quiet title dispute with her sons concerning various real properties comprising a portfolio worth about $20 Million. Several mediation sessions were convened in an effort to resolve the dispute and avoid litigation. Those efforts were not successful. However, after litigation was filed, a settlement was eventually reached along lines similar to those discussed in the earlier mediations.

**Mediation Philosophy**

I am at the table to help the parties and their counsel explore whether a negotiated resolution is in the strategic best interests of both/all parties.

My style is both evaluative and facilitative as the situation requires or the parties/counsel may request.

My general approach is to nudge, not bludgeon.

In contrast to mediation, in an arbitration setting, I am at the table to help the parties achieve closure to a dispute by making a binding decision on the merits. My job as arbitrator is to make an impartial decision on the issues and claims submitted based upon the evidence and argument presented by the parties through their counsel, and to administer the hearing process in a way that is fair, efficient and even-handed.

**Mediation References**

Available upon request.

**Alternative Dispute Resolution Training**

Faculty, AAA Essential Mediation Skills for the New Mediator, 2016; AAA/ICDR/Mediation.org Panel Conference, 2016; Faculty, AAA Impasse: Mediating in the "Red Zone", 2015; Faculty, AAA Essential Mediation Skills for the New Mediator, 2015, 2014; AAA E-Discovery: Arbitration in a Digital World,
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Education
University of Southern California (BA, Psychology, cum laud); University of California at Berkeley (JD); Pepperdine University, School of Law, Straus Institute (LLM in Dispute Resolution).

Publications and Speaking Engagements
Has been a frequent speaker and trainer for the last 25 years.

Recent speaking engagements include: "Essential Skills for the New Mediator!" (AAA, 2013, 2014, 2015, 2016); "Arbitration Theory and Practice" (Pepperdine School of Law, 2016); "Mediation Theory and Practice" (Pepperdine School of Law, 2012, 2014, 2016); "Recent Developments in Arbitration and Mediation" (OCBA-ADR Section, 2013, 2014, 2015, 2016); "Mediation Advocacy: Negotiation Tips and Perspectives" (Private Seminar, 2015); "Impasse: Mediating in the Red Zone" (AAA, 2015); "E-Discovery: Arbitration in a Digital World" (AAA, 2015); "Lying for the Sake of the Deal" (ABA Dispute Resolution Section, 2015, AAA/ICDR, 2016) "Conducting Research & Investigations: The Arbitrator's Authority" (AAA, 2014); "Principled Deliberations: Decision-Making Skills for Arbitrators" (AAA, 2014); "Are Your Secrets Safe in Mediation" (OCBA-Commercial Law & Bankruptcy Section, 2012); "Follow the Money: Tips, Strategies and Special Issues Associated with Settling Insured Claims" (OCBA-ADR Section, 2012); "The Well Wrought ADR Clause" (ABA-Dispute Resolution Section, 2012); "Economy, Speed and Justice: What Neutrals, Forum Providers, Advocates and Parties Can do to Control and Reduce the Cost of ADR Processes (OCBA-ADR Section, 2012); "Mediating in the 21st Century: Current Topics, Trends and Strategies" (American Bankruptcy Institute, 2012); "Maximizing Efficiency and Economy in Arbitration: Challenges at the Preliminary Hearing" (AAA, 2011).

Recent ADR articles include: "Effective Use of a Forensic Accountant in Mediating Commercial Fraud Disputes" (Ch. 16 of Fraud and Forensics, ABI, 2015); "Mediation Advocacy: Negotiation Tips and Perspectives" (OC Lawyer, July 2015); "Piercing the Veil of Mediation" (LA Daily Journal, May 8, 2015); "Mediation Confidentiality: For California Litigants, Why Should Mediation Confidentiality be a Function of the Court in Which the Litigation is Pending?" 12 Pepp. Disp. Resol. L.J. 63 (2012); "It Takes Two to Tango: How to Get the Most Out of Mediation" Daily Journal Verdicts and Settlements (May 27, 2011); "What's Your Client's Case Worth for Purposes of Settlement," private publication/brochure (Summer 2011); "How to Get the Most Out of Your Mediation," private publication/brochure (Spring 2011); "20 Questions re Commercial Arbitration," private publication/brochure (Winter 2010); "20 Questions re Mediation," private publication/brochure (Fall 2010); "Severability Rule Expanded: Supreme Court Holds that Parties' Agreement to Delegate Questions of Arbitrability Shall be Enforced, Including Those that Go to the Validity of the Arbitration Agreement Itself," American Bar Association / Litigation Section, website publication (2010); "What to Do When the Threat of Bankruptcy Becomes an Issue in Mediation," Conflict Management / American Bar Association Section of Litigation, Vol. 14, Issue 3 (2010); "Truth or Dare: California's New Ethics Standards for Private Arbitrators," Business Law News (Issue 1 2008); "California's New Ethics Standards: A Hot Bed of Controversy and Conflicting Decisions," 5 J. Am. Arb.

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