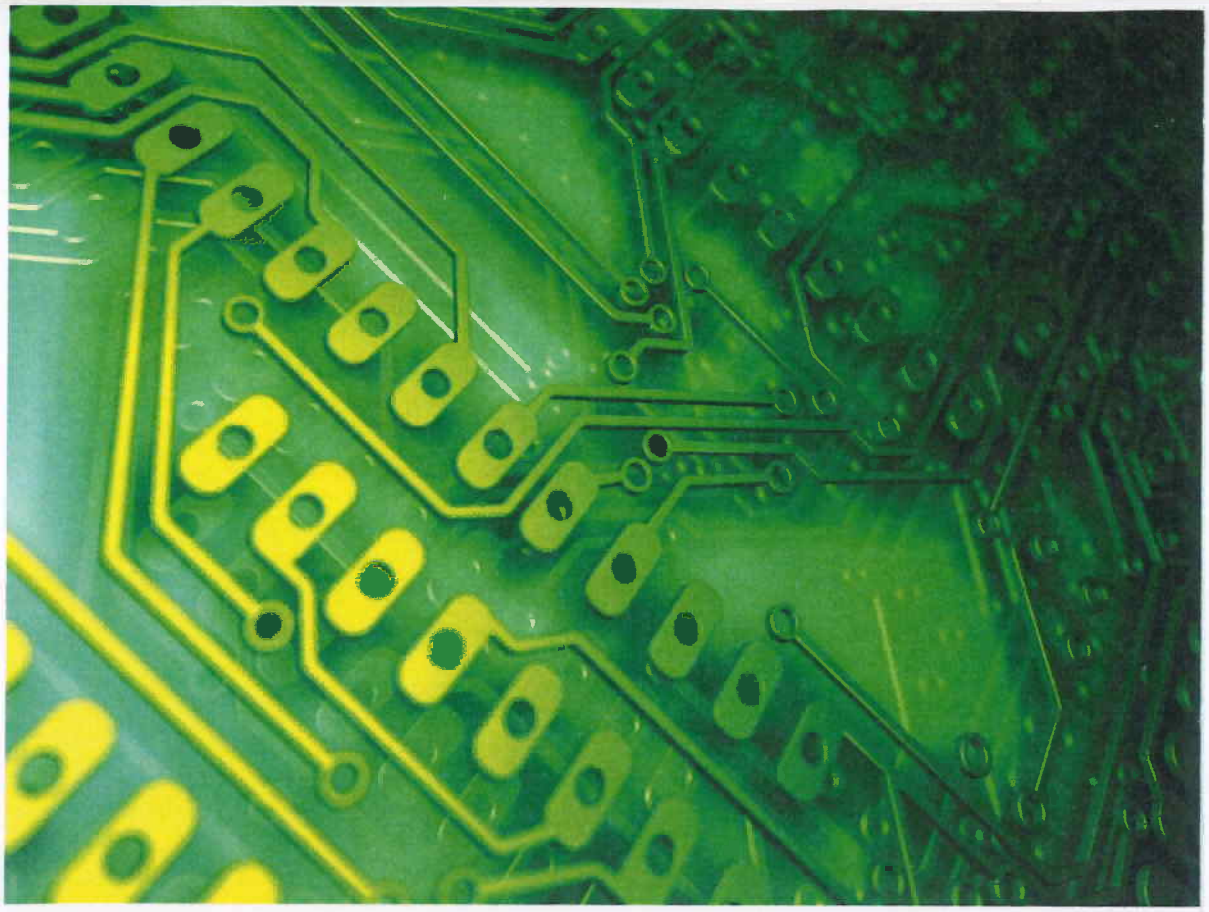

Dispute Resolution and e-Discovery

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Chapter 3

Mediation and Discovery

by Simeon H. Baum[*]

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§ 3:1 Introduction

There is nothing like a book focused on e-discovery to give the reader a sense of the complexity and expense of litigation. Over the last two decades, as cases have grown increasingly complex and expensive, there has been growing interest in alternative dispute resolution ("ADR") mechanisms, like arbitration and mediation, as a possible means of reducing the cost, formality, complexity and disruption of litigation. Arbitration is a process in which one or more neutral experts make factual findings and determinations, under legal and other norms, that are binding on the parties. Historically, it was seen as fair, fast, flexible, final and, if not free, then inexpensive. Over the last decade or more, increased complexity, forum, satellite litigation, the use of U.S. litigation style discovery[1] in that forum have magnified costs and delays in arbitration. Nevertheless, arbitration has continued to thrive, particularly on the international scene, where parties seek a neutral forum offering no "home court" advantage.

Mediation has emerged as another available process for resolving disputes to the satisfaction of the parties. At its best, media-

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[Section 3:1]

[1]In 2008, Bernice Leber, then chair of the New York State Bar Association ("NYSBA") charged this author, who then served as Chair of NYSBA's newly formed Dispute Resolution Section, with addressing the problem of uncertainty, lack of control, rising costs, and conversely the risk of unfairness through arbitrary limits on discovery in the arbitration forum. Ms. Leber posed the problem with two scenarios: (1) the arbitrator who permits wide open discovery way beyond party or counsel's initial expectations or preferences; and (2) the arbitrator who bars necessary discovery adversely impacting the fairness of the proceeding or outcome. Recognizing that norms might vary depending on the arbitral context, the Section broke this challenge down into different types of arbitration and the forum involved. In 2009, a task force led by Carroll Neesemann, John Wilkinson and Sherman Kahn published a Report on Arbitration Discovery in Domestic Commercial Cases. *See,* http://www.nysba.org/Content/NavigationMenu42/April42009HouseofDelegatesMeetingAgendaItems/DiscoveryPreceptsReport.pdf. That report proposed a list of factors to be considered by arbitrators in making discovery decisions. The following year, NYSBA's Dispute Resolution Section prepared a set of Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of International Arbitration. *See*, http://www.nysba.org/Content/NavigationMenu42/November62010HouseofDelegatesMeetingAgendaItems/internationalguidelines.pdf.

tion enables parties to focus on the core issues, interests and information needed, cutting time and cost and leading to an expedited resolution of the matter tailored to the parties' needs and circumstances. Mediation offers truncated disclosure in a confidential setting that can cut through many of litigation's tangles. This chapter will explore the nature and uses of mediation, consider its benefits and limitations, and investigate the relationship of mediation and discovery.

Discovery in the litigation context serves two core purposes: developing the strengths and weaknesses of one's own case and developing the strengths and weaknesses of the adverse party's case.[2] Mediation, as will be more fully discussed below, is essentially a facilitated negotiation. Information has a broader use in negotiation and mediation than litigation. In negotiation and mediation, information is developed not only for case assessment, but also to understand and address the underlying causes of a dispute, to understand and modulate the parties relationship, and to arrive at and judge the value, feasibility and durability of a deal. Information is the currency of mediation. One of the unique features of the mediation process is the freedom and creativity that infuses it. Litigation follows established rules of evidence and civil practice and procedure. Mediation by contrast is informal and an extension of party choice. In mediation, parties and the mediator can adjust to develop information in a flexible way, for disclosure in a confidential setting. Freedom of process creation enables parties and the mediator directly to address some of the secondary aspects of information development that attend litigation. While the ostensible reason for discovery in litigation is case development, the cost and burden of discovery can often become a problem by itself, and can be used by one party as leverage against the other. Mediation permits parties to pare down information sought and disclosed to that which is essential to reach a deal. Thus, in mediation, not only outcome and information, but even the process itself can be considered, crafted and negotiated. We can ask the questions: Is this working? Is this information, and the process of obtaining information, worth the cost? What is the best way for us to proceed? This chapter will

[2]While it might seem counterintuitive, litigators know that it is important to understand the weaknesses of one's own case and the strengths of the adversary's case as well. Knowledge of this information can help the advocate think ahead to develop the best spin for his weaknesses, to introduce the weaknesses himself in order to draw its poison, to work to find ways to exclude that information from introduction into evidence, to dig deeper and find flaws with the weakness itself, and to find legal arguments that make the weakness immaterial or irrelevant.

take a closer look at how information and the process of information gathering, assessment, use and disclosure is handled in mediation.

§ 3:2 Nature of mediation

General Definitions

Over the last 20 years, the mediation field has generated divergent views on the nature of mediation and the role and purpose of the mediator. A classic definition of mediation is found in the ABA/AAA/SPIDR Standards of Conduct for Mediators:

> Mediation is a process in which an impartial third party—a mediator—facilitates the resolution of a dispute by promoting voluntary agreement (or "self-determination") by the parties to the dispute. A mediator facilitates communications, promotes understanding, focuses the parties on their interests, and seeks creative problem solving to enable the parties to reach their own agreement.[1]

In addition to focusing parties on their own interests, the mediator can also encourage parties to consider the alternatives to deal proposals that are under consideration. Among these alternatives can be economic and non-economic costs, risks, and probable outcomes of litigation

Riskin's Grid and the Evaluative-Directive/Facilitative Debate

Over the last two decades, particularly in the 1990s, there was lively discussion concerning the scope, function and purpose of the mediator's role. In his seminal article, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed,* Professor Len Riskin mapped out what he saw to be a variety of approaches and orientations demonstrated by mediators,[2] using contrasting concepts of "broad/narrow," and "evaluative-and-directive/facilitative" to create spectrums fram-

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[Section 3:2]

[1]Standards of Conduct for Mediators (Joint Committee of Delegates from the American Arbitration Association, American Bar Association Sections of Dispute Resolution and Litigation, and the Society of Professionals in Dispute Resolution 1994); cited in KK Kovach & LP Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 Harv. Neg. L. Rev. 71 (hereinafter "*Riskin's Risks*"), at 74, n. 23.

[2]*See*, Leonard L. Riskin, Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed, 1 HARV. NEG. L. REV. 7, 25 (1996) hereinafter Riskin, Grid]. The Grid was first published in 1994. *See also* Leonard L. Riskin, Mediator Orientations, Strategies and Techniques, 12 Alternatives to High Cost Litig. 111 (1994).

ing the map. Some mediators, for example, might see themselves as mini-judges, holding a discussion in which the chief focus is legal issues. Toward the end of this discussion, the mediator might provide an evaluation of the case and strongly urge the parties to come to a settlement under terms that this mediator proposed. This extreme example would be deemed "narrowly focused, evaluative and directive" in the Riskin Grid.

Other mediators might see their job as facilitating the parties' own decision making. These mediators would use elicitive means—through questioning, reflecting back the parties own communications and meanings, and encouragement—to help the parties through their own decision making process, offering assistance in keeping communications effective and constructive, and helping parties seek clarity and maintain stability throughout this process. In this example, the mediators would foster discussion on any topic the parties find meaningful. This could include business interests, personal and community values, emotions generated by the conflict, principles, economic limitations, hierarchical pressures, the negotiation process itself, goals, visions, aspirations,[3] and a wide range of other topics, as well as strengths and weaknesses of the legal case. This latter approach to mediation would fit in the "broadly focused, facilitative" quadrant of the Riskin Grid.

Riskin's Grid sparked passionate and thoughtful discussion in the field. Professors Lela Love and Kim Kovach, both now past Chairs of the ABA Dispute Resolution Section, declared "evaluative mediation" to be an oxymoron.[4] To them, and many others in the field, the mediator's role is purely facilitative. While there might be a separate and legitimate role for a neutral evaluator or arbitrator, Love and Kovach assert that labels, transparency and consumer choice matter and that mediators should be clear on their own role; they are not a practice "rent-a-judge." This is not to say that the mediator is simply a "message bearer." Love and Kovach point out a variety of actions a mediator might perform which are far more active, such as shifting the agenda, prodding parties to reconsider a position and, perhaps in caucus, challeng-

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[3]*See,* Love, L, *Training Mediators to Listen—Deconstructing Dialogue and Constructing Understanding, Agendas and Agreements*, 38 Fam. & Concil. Cts. Rev. 27 (Jan. 2000 Sage Publications, Inc.), reprinted in LEXIS/NEXIS.

[4]*See*, *Riskin's Risks, supra;* Kovach & Love*, Evaluative Mediation is an Oxymoron*, 14 Alternatives to High Cost Litig. 31 (1996).

ing an unworkable or misleading proposal.[5] There are many tasks performed by a facilitative style mediator to activate the parties' own reflection, enhance the quality of their communication, and engage and keep them in a process that leads to change and resolution. Love and Kovach's central point is that it is up to the parties to arrive at their own decision and evaluation, and it is the mediator's role simply to help them do that, not to tell the parties what is fair, the likely legal outcome, or the right deal for them.

It should be noted that nothing prevents the broadly focused, facilitative mediator from also engaging the parties and their counsel in a thoughtful consideration of the strengths and weaknesses of their own case and the other party's case. The difference is that it is the parties and their counsel, rather than the mediator who openly engage in this evaluation.

Mediation as Facilitated Negotiation & the Problem Solving Model

While case analysis is thus not alien to the process, a hallmark of the broad, facilitative mediation approach is joint, mutual gains problem solving. A centrist view of mediation casts the process as a facilitated negotiation. To be effective, mediators must understand the negotiation process and grease the wheels of negotiation to enable all parties to be most effective in arriving at a deal that resolves their dispute. The Harvard Negotiation project and other literature in the field has informed the mediation process. Fisher and Ury's "Getting to Yes"[6] popularized the recognition that greater gains can be achieved for all negotiators through cooperation than through competition. This notion was captured by the Italian economist, Vilfredo Pareto, who posited the optimal deal as one that maximizes achievement of the interests of all parties.[7] Fisher and Ury advise negotiators on how best to achieve the Pareto optimum, or the "*win/win*" result in five essential points.

First, they recommend that negotiators "separate the people from the problem." They observe that where relationships become part of the negotiation, or even drive the negotiation, conflict and inefficiencies can arise. One example given is that of the negotia-

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[5]*Riskin's Risks, supra*, n. 37, citing Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the "Grid" Lock*, 24 FLA. ST. U. L. REV. 985 (1997).

[6]Fisher, Roger and Ury, William, Getting to Yes: Negotiating Agreement Without Giving In (New York, NY: Penguin Books, 1983).

[7]Pareto, Vilfredo, *Cours d'Economie Politique* (1896–97).

tor in the *shuk* or Arab marketplace. If the lamp merchant knows the purchaser's family and is seen as overcharging, he may be perceived as having no care for that family. Similarly if the purchaser is seen as offering too little, he might be showing a lack of concern for the wellbeing of the merchant's family. A lowball offer might offend the integrity of the merchant, the value of his wares, and his status in society. Offers or demands that do not reflect the "real" or "objective" value of the item might be seen as an insult to the intelligence of the party on the other side. Perceived slights can escalate into use of mutually insulting or threatening language. Before parties know it, *ad homina* are being launched and their relationship is not simply part of the issue, it is seriously at risk.

Fisher and Ury therefore advise negotiators to be "soft on the people and hard on the problem." Casting negotiation as problem solving, they recommend that negotiators use their tough analytic skills to identify the issues and find solutions to the problem. By being "soft" on the people, using encouraging forms of communication, active listening skills, and acknowledgment, negotiators cultivate a smoother, richer, and more complete flow of the information that is needed to perform this problem solving.

The next step in this problem solving model is to move from "positions to interests." Returning to the *shuk*, we can imagine a negotiation in which the seller makes an absurdly high demand and the buyer makes an equally implausibly low offer. Each party takes a "position" and holds firm. The seller swears that the lamp is worth every penny demanded and stakes his honor on not taking a penny less, and *vice versa*. In litigation, this can be seen in lawyer-negotiators insisting on the complete validity of their claims or defenses and the certainty of a favorable outcome, and, accordingly, demanding 100% payment or insisting on not paying a dime or making any other concession. What Fisher and Ury observe is that positional bargaining, like relationship based bargaining, generates inefficiencies and conflict. Where each party holds firm to a position, no deal can be done. Once strong positions have been staked out, with claims of truth and moral superiority attached, the only way to arrive at a deal is for the parties to prove themselves to be liars or reprobates. Loss of face is inevitable with positional approaches to bargaining.

Fisher and Ury suggest another way. Each party candidly describes his own interests and learns the interests of the other. There is no risk of apparent dishonesty when the lamp seller states that he needs to make a profit, feed his family and maintain his business—or any other need he might have. Similarly, there is no harm in the buyer's expressing his need for

light, quality interior design, love of antiques, need to preserve the family fortune, financial limitations, or any other set of needs or interests.

Indeed, by identifying interests, the parties prepare themselves for step three in this problem solving model: developing options for mutual gain, to maximize satisfaction of the interests of all parties—*i.e.*, the Pareto optimum. In a classic example, two sisters are described as fighting over a dozen oranges. Each girl takes the *position* that she is entitled to the full dozen. A distributive approach to solving this problem might be to split the oranges, giving each girl six. Along comes their Uncle Sol, who wisely asks the sisters why they want the oranges. He discovers that Susie wants to make orange cake and Sally wants to make orange juice. Thus, Susie needs the rinds and Sally needs the pulp. Armed with this knowledge of *interests*, Uncle Sol can give each girl 100% of what she wants. One sister gets all rinds and the other gets all pulp. Critical to solving this problem is using the word "why" to learn the interests of each party. By learning their interests, Uncle Sol can arrive at an integrative approach generating greater potential gains than that available with a distributive approach.

Fisher and Ury's fourth piece of advice is to use standards in negotiation. By finding a standard that all parties might find acceptable, the negotiations shift from a battle of wills to an objective dimension. Standards might be that which is objectively verifiable, a common principle, or a shared or recognized value, method or approach. One frequently cited example is using the "Kelly Blue Book" as a standard for arriving at the value of a used car in a negotiation with one's automobile insurer. Standards can be of great help in distributive as well as integrative approaches in allocating value in a negotiation.

Finally, in their appendix, Fisher and Ury coin the now much used acronym, BATNA: the "best alternative to a negotiated agreement." By considering what will happen if one chooses not to take a given deal, one is put in a better position for evaluating that proposal. Say, for example, one is making $150,000 as an associate in a law firm. One has been there for several years, has a good likelihood of making partner, but is not very interested in the firm's specialty—insurance coverage litigation. Along comes an offer from an entertainment law firm, at $140,000. The offer is $10,000 lower than one's BATNA, *i.e.,* one's existing salary. Nevertheless, applying non-economic factors, one might choose to take a $10,000 hit on the theory that greater job satisfaction is worth more than $10,000; let us say for this example that one attended Julliard before law school and has always hoped to work

in a job associated with the arts. Other factors could be comparing chances of partnership at each firm and comparing firm culture and lifestyle. The BATNA offers a point of comparison on all fronts, enabling one to develop a standard by which to judge the proposed deal. In negotiations concerning cases that are in, or might go to, court, the probable court outcome and associated transaction costs[8]—including noneconomic factors like adverse publicity and disruption—are often seen as the legal BATNA against which the value of a given settlement proposal might be judged.

Other Models of Mediation—Transformative, Understanding Based, and Protean (or 360 Degree) Mediation

Mediators who adopt the problem solving model of negotiation see their chief job as helping the parties engage constructively in a problem solving process. The view of mediator as problem-solver was challenged in the mid 1990s, by the ultra-facilitative "Transformative" school of mediation popularized by Baruch Bush and Joseph Folger in a book entitled "The Promise of Mediation."[9] The electrifying premise of transformative mediation is that the mediator's purpose is not to solve a problem or settle a case. Rather, the mediator has the dual purpose of fostering empowerment and recognition. The focus of the mediator is not so much on the parties' deal as it is on the quality of their relationship and their mode of communication. Moreover, the transformative mediator does not seek to see the big picture, figuring out the core issues, identifying interests, generating options to meet interests, using standards to help with valuation, distribution or decision making, or even comparing deals to alternatives. Rather, the mediator applies a moment to moment microfocus, reflecting back what each party does or says, following the parties as a passenger in the back seat of a car is driven where the driver takes him.

This approach is rooted in the transformatives' understanding

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[8]Transaction costs include fees that will be spent on lawyers and experts, as well as the associated costs and disbursements that make their way into the typical retainer agreement. One of the greatest transaction costs can be those associated with the activity that is the subject of this book: e-discovery. Related factors can include present value of the proposed deal and possible interest. Collectability of a judgment is another factor to be considered in this type of analysis.

[9]Bush, Robert A. Baruch and Folger, Joseph P., The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition (Jossey-Bass Publishers, San Francisco 1994) ("Promise of Mediation"). A good synopsis of this book is found at: http://www.colorado.edu/conflict/transform/bushbook.htm.

of the nature of conflict and of the self. Transformatives see people as being uncomfortable in conflict. We can even feel ugly in that role, and urgently want to be out of it. We lash out and become defensive, shoring up protective walls around ourselves and focusing on our own feelings, views, interests, rights and entitlements. In this state, we have difficulty seeing the other's perspective. When parties see that they have some control over themselves and the situation, they can relax a bit and open up to the perspective of the other. In short, empowerment leads to the growth of empathy, and empathy is the moral transformation that gives "Transformative" mediation its name. Resolution is more a natural outgrowth of this change than the goal of the mediator. In turn, empowerment is fostered by the mediator's raising up for parties opportunities to make choices concerning not only the deal terms but also the host of available process choices, including, *inter alia*, whether to speak or not, what to say, how to respond, and whether or not to make a deal. Bush and Folger adopt a view of self that is neither individualistic nor organic (collectivist), but rather a "both/and" view that focuses on relationship[10] and the choice of how and in which mode one relates to the other. Conflict is seen as a crisis in relationship and, thus, transformative focus is on the quality of relationship.[11]

Mediators Jack Himmelstein and Gary Friedman have for years promoted an "understanding based" approach to mediation.[12] For them, conflict is based on misunderstanding and unwillingness to accept reality. As parties come to a better understanding of each other and of their compelling contexts and circumstances, they can dig beneath the "v." in a litigation or dispute and come to a resolution through understanding. The understanding based approach posits that the parties are already in relationship in the broader world. The mediator's job is to bring peace, not conflict, into the room. Accordingly Himmelstein

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[10]*See,* Promise of Mediation, Ch. 9. While Bush cites to the work of a mid-20th century social scientist in connection with this work, the modern Jewish existentialist thinker, Martin Buber, sets for a groundbreaking work on relationship as essential to one's true self in I and Thou (Kaufman, W. trans., Charles Scribner's Sons 1970).

[11]From a transformative vantage point, Fisher and Ury's advice to be soft on people, and to separate the people from the problem, can be seen as an instrumental approach to relationships from an individualistic sense of self. Transformatives, by contrast, give high value to the quality of relationship as essential to the nature of being fully human. In their defense, Fisher and Ury could argue that their first injunction simply liberates relationship from entanglement in an independently solvable problem.

[12]*See,* Friedman, G, Himmelstein, J., Challenging Conflict: Mediation Through Understanding (ABA Dispute Resolution Section 2009).

and Friedman train mediators to use joint session only. Private, confidential meetings between mediator and fewer than all parties—known as caucuses—are rarely, if ever, held in this model of mediation.

Development of mediation theory and schools over the last two decades has been good for the field. It creates greater clarity, promotes discipline and enables practitioners and users to make sharper choices in mediator selection, process design, and use of opportunities in the mediation process itself. Distinctions increase recognition of possibilities. Yet, for many mediators, what Peter Adler says about negotiators in his piece "Protean Negotiation"[13] can apply to mediators themselves. Many mediators do not fit a particular mold or school and do not necessarily limit themselves by being purely facilitative, or evaluative, directive, transformative or understanding based. A phrase used by mediator Lori Matles—"the 360 mediator"—might apply to the mediator who, while generally seeking to fulfill the central role of facilitating the parties negotiation or dialogue, will also do what seems appropriate under the circumstances. Whether these choices to depart from the facilitative role are error or highly effective is what makes mediation an art. Tact, appropriateness, knowing when rapport has been developed, understanding when humor will help or offend, and a host of subtle interpersonal skills that come with emotional intelligence can guide the mediator's choices of variation from the common theme.

§ 3:3 Uses of mediation

Court-Annexed, Public and Private Mediation

The use of mediation has grown extensively over the last two decades and is now being used to resolve disputes in nearly every conceivable substantive area. In the early 1990s, the federal district courts began pilot programs utilizing mediation. Those programs have grown into regular panels of mediators applied to nearly every type of civil case found in those courts.[1] Similarly, state courts around the country have developed mediation

[13]Adler, P.S., *Protean Negotiation,* in The Negotiator's Fieldbook, The Desk Reference for the Experienced Negotiator, Kupfer Schneider, A., Honeyman, C., editors (ABA Section of Dispute Resolution 2006).

[Section 3:3]

[1]The Alternative Dispute Resolution Act of 1998 formalized these pilot programs, directed all district courts to devise and implement some form of ADR program, and empowered federal courts to mandate arty participation in mediation or neutral evaluation. 28 U.S.C. §§ 651 to 658 (1998).

programs for a variety of case types. California, Texas, Florida, New Jersey, and Maryland feature widely used mandatory mediation programs, or multi-door ADR approaches. In New York, for example, mediation programs began at the community dispute level with referrals to Community Dispute Resolution Centers ("CDRCs") from family courts, Civil Court, and criminal courts. Mediation and neutral evaluation programs next appeared in New York's matrimonial courts. In the late 1990s, New York's Commercial Division, which handles its large, complex business cases, formed panels of neutrals offering a broad array of ADR options, including mediation.

Mediation has been embraced by the federal government as well.[2] Congress passed the Administrative Dispute Resolution Act of 1990,[3] which was renewed without a sunset provision in 1996.[4] Implementation of these ADR Acts gained strength in 1996, when President Clinton issued an Executive Order directing federal agencies to develop ADR programs for intra-agency, interagency, and even agency-public disputes. Today, a wide array of ADR, and in particular mediation, programs exist within the federal government. Quasi public organizations, like the U.S. Postal Service, have implemented mediation programs, like the USPS's REDRESS. Similarly Self Regulating Organizations (SROs), like the National Association of Securities Dealers (NASD), now called the Financial Industry Regulatory Association (FINRA), have mediation programs. FINRA, which manages approximately 85% of all customer-broker disputes nationwide,[5] in addition to broker-broker dealer disputes, handles nearly 1,000 mediations a year.[6]

In the private sector, acceptance of mediation is also widespread. The Center for Public Resources ("CPR"), now known as the International Center for Conflict Prevention and Resolution (still "CPR"), promoted a "pledge," adopted by many Fortune 500 corporations, in which corporations commit to utilizing ADR

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[2]A helpful synopsis of the expansion of the use of ADR in the federal government can be found at http://www.dot.gov/ost/ogc/CADR/policy.htm#__edn23.

[3]Pub. L. No. 101-552, 104 Stat. 2736 (codified at 5 U.S.C. § 571).

[4]Pub. L. No. 104-320, 110 Stat. 3870 (codified at 5 U.S.C. § 571).

[5]FINRA's annual intake of arbitrations pursuant to mandatory arbitration clauses numbers in excess of 8,000.

[6]Statistics on FINRA arbitration and mediation filings and resolutions can be found at: http://www.finra.org/ArbitrationMediation/AboutFINRADR/Statistics/. During one of its more busy years, the NASD (FINRA's precursor) had 1,300 mediations pending.

mechanisms before resorting to litigation. Mediation or other ADR clauses can be found in many tailored and garden variety agreements across the board. Some particularly favored areas[7] include insurance[8] and reinsurance[9]—both first party and third party claims[10]—employment discrimination, securities, general business, family and matrimonial, and the commercial matrimonial (partnership or other business form dissolutions or general disputes), franchising, intellectual property, and real estate.[11]

Matching the Mediator to the Mess

As demonstrated above, mediation is a flexible process that can address a variety of different concerns. Depending on the participants' needs and the posture of a particular dispute or case, one mode of mediation might be more suitable than another.

Let us imagine, for example, an embedded employment dispute, where the parties have an ongoing workplace relationship and where the greatest source of conflict is less a monetary issue than the manner in which an employee is being treated or a manager is being perceived. For that dispute, a transformative model might be the most appropriate. The transformative mediator will focus on the quality of the parties' relationship and their communication. If effective in fostering empowerment and recognition, the transformative approach might repair, restore or enhance the relationship, making for a better tone in the workplace after completion of the mediation session.

Now, let us imagine an accounting proceeding between busi-

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[7]The Dispute Resolution Section of the New York State Bar Association has published a series of White Papers elaborating on mediation in a variety of substantive areas. See 13 White Papers displayed at: http://www.nysba.org/AM/Template.cfm?Section=Section__Reports__and__White__Papers=/TaggedPage/TaggedPageDisplay.cfm=55=47287.

[8]Policies offering coverage in areas where the use of mediation has grown include disability, life, and health, as well as the more typical property and casualty policies. Directors and Officers ("D&O") or Errors and Omissions ("E&O") coverage, Employment Practices Liability Insurance ("EPLI"), and even Title Insurance policies generate disputes that are commonly being mediated today. For further details on Insurance and Reinsurance industry mediation, *see,* Platto, C., Scarpatto, P., and Baum, S., White Paper on Insurance and Reinsurance Industry Mediation (New York State Bar Association Dispute Resolution Section 2011).

[9]One well regarded panel of reinsurance industry neutrals is ARIAS.

[10]Both coverage issues and underlying claims are excellent areas for mediation.

[11]The Dispute Resolution Section of the New York State Bar Association has published a series of White Papers elaborating on mediation in a variety of substantive areas.

ness partners, now pending in a state court's Commercial Division or its equivalent. Perhaps there, a facilitative style mediator with a broad focus might be ideal. That mediator could address the parties' relationship, elicit their interests and creatively explore options to meet the parties' interests. This mediation might commence with a view that the plaintiff is in the dark on bookkeeping and needs information to determine just how much additional money he is owed. The cost of a full blown accounting proceeding might be monumental, and, if there are serious bookkeeping deficiencies, the outcome might still be inconclusive. A dissolution of the partnership might kill the proverbial goose that lays the golden egg. It is quite possible that, in this scenario, interest development might reveal that one partner is domestically focused and would like to run the retail operation and the other partner would like to go global, exploiting the brand on the international market. This discovery could lead to a restructuring of the business and licensing arrangements that separates out the partners' functions and domains, preserves, or even augments, value for both parties, and obviates the original need for an accounting.

Imagine a third, insurance oriented scenario, say a personal injury matter between strangers. The bulk of key discovery has been completed, but development of experts, not to mention a lengthy trial and possible appeal, have not yet occurred. There is thus no ongoing relationship. Here a facilitative mediator who is capable of running the parties through an effective risk and transaction cost analysis might be optimal. Comprehending the strengths and weaknesses of a case might make it easier for the parties, including the insurance claims representative, to come to a monetary deal that makes sense in light of the possible court outcome and its ancillary costs. Effective management of the negotiation can help parties, counsel and experienced claims representatives as they approach the last phase of negotiations. In this phase emotions even among professionals can hit higher valences as people test each other's commitment level, seek to ascertain that value is not being left behind or overpaid, and offer concessions beyond their original goals for the endgame. This mediator can foster, or in caucus engage in, empathetic discussion with the injured party, providing understanding and acknowledgement which provides satisfaction beyond mere monetary relief.

In sum, it pays for counsel to be alert to the various modes of, and possibilities available in, mediation to maximize client satisfaction. Counsel should use the process in a way that takes full advantage of what it has to offer, not only for outcome but

also for the route to that end and management of the people involved.

§ 3:4 Preparation for mediation

In some forums, little, if any, preparation is undertaken prior to participating in the mediation session. This is a mistake. For most substantial matters going into mediation—whether it is an employment, insurance, securities, business, intellectual property, or any other matter that might make its way into Court—it makes a significant difference to prepare for mediation. While an entire chapter could be written on preparation, for purposes of this chapter, where our focus is discovery and mediation, we will give a brief overview of preliminary considerations and preparation for the mediation session.

The first steps in mediation preparation are the threshold questions of whether and when to mediate, and selection of the mediator. While much can be said about this, for purposes of this Chapter, we would urge that the sooner one mediates, the better. As will be discussed further, to the extent there is a concern that certain information is needed before a party can make a rational decision to settle a case, that information can be obtained in a much more direct and speedy manner through mediation. The sooner resources are committed to resolving the matter the greater the resources that will be available for the settlement pot.

On mediator selection, sophisticated counsel should consider the process needs, client needs, relationship issues (including relationship with adverse counsel), case assessment needs, and other factors referenced in the above discussion of the nature of mediation and matching the mediator to the mess. Mediators tend to be selected based on prior experience of counsel or parties with that mediator, or on reputation—essentially the prior experience of others. Counsel might ask colleagues, reach out to Court ADR Administrators, or inquire from other known mediators or ADR experts about the reputation, style and approach of a given mediator; or generally, seek a mediator who fits the particular bill. It is not out of the norm for experienced counsel to contact a potential mediator to learn of that mediator's availability and experience with mediating matters of the type in question. It is entirely appropriate for counsel during the mediator selection phase to ask not only about substantive background, but also about the mediator's style. This is a chance to learn if the mediator is facilitative, gives evaluative feedback, shares process choices with parties and counsel or is more directive, follows an

understanding based model—including the degree to which the mediator uses joint session or caucuses—whether the mediator is transformative, or whether he or she takes a protean, or 360 degree approach. Not only are these questions appropriate, but they send a positive message to the mediator about counsel's familiarity with, and support of, the mediation process.

Counsel might go further still in this initial interview and seek the mediator's views on what approach might work best from a holistic perspective to satisfy the parties' needs—ranging from case risk and transaction cost analysis, through party dynamics, emotional issues, business issues, economic limitations, reputational and public relations issues, discovery and other informational needs, or any other process issue that might exist. Of course, this is also an opportunity to learn whether the mediator has any conflicts. Unlike binding evaluative processes like arbitration or litigation, prior experience or even relationships with the parties or counsel does not preclude the mediator's participation. Rather, those relationships should be disclosed, and the parties are free to waive any perceived conflicts. Indeed, some sophisticated counsel actually prefer finding a mediator who has worked with, and has a good relationship with the counterparty, on the theory that feedback from this mediator will be very credible to the party that already knows and trusts him or her.

After mediator selection, three general areas for preparation include (a) further communications with the mediator and with the other parties or their counsel, (b) preparation of pre-mediation statements, and (c) communications with one's own client.

Pre-Mediation Conference Calls

In advance of mediation, particularly in matters that merit counsel's retention, once the mediator has been selected or appointed, it is advisable to participate in a pre-mediation conference call with the mediator. This can be done as a joint call, with all counsel (or parties) participating, or in separate calls that are essentially equivalent to confidential pre-mediation caucuses. Since the mediator is not a decision-maker, there is not the same bar against "*ex parte*" communications with the neutral third party as one finds in arbitration or litigation.[1]

One key point to cover during this call is who will be attending

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[Section 3:4]

[1]*See* ABA/ABA/SPIDR Standards of Conduct for Mediators (1994), revised 2005, Standard 2 on "Impartiality" (requiring that a mediator decline an appointment if that mediator cannot act with impartiality—a subjective standard

the mediation—both from one's own group as well as from the counterparties. It is important to establish that people with full authority will attend the mediation, and, where applicable, that there will not be hierarchical imbalances that will create interparty issues. It can be awkward and time consuming to begin a mediation with one party's feeling insulted that he or she chose to put down other business to prepare for and attend the mediation, while the other party's equivalent level representative did not deign to do the same.

Most pertinent to the focus of this chapter, the most central task of the first pre-mediation conference call, is to provide the mediator with a "nutshell" overview of the dispute and associated case for the purpose of clarifying what, if anything, needs to be done before the first mediation session, so that when the parties do get together they have a fully productive session. This is the opportunity for all concerned—mediator, counsel, and any participating parties—to be sure that they will have pertinent information in hand to discuss and consider during their mediated negotiation. In this regard, the mediator might check whether formal discovery is outstanding, whether document production or interrogatory responses are needed, whether depositions need to be conducted, damages need to be developed, or expert reports exist or need to be exchanged or provided. A pivotal balance here is whether core information that will be needed for a productive negotiation has already been made available to all concerned parties or can be provided at less cost and expense than might be required by full blown, pretrial discovery. This balance of cost, effectiveness and need is a major advantage of the pragmatic and flexible approach that may be taken in mediation.

The first pre-mediation conference call is also a good opportunity to be clear on what the mediator can use in, and attached to, the pre-mediation statement.

Pre-Mediation Statements

Pre-mediation statements are very helpful in bringing the

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determined by the mediator); and Standard 3 on Conflicts of Interest (requiring the mediator to determine whether a conflict or the appearance of a conflict exists and to disclose this, but permitting the mediator to continue with the mediation if there has been disclosure and waiver. Standard 3.C.). A limitation to this disclose and waive rule is expressed in Standard 3.E: "If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary." *Id.* The 2005 revision was adopted by SPIDR's successor, ACR, *i.e.,* the Association for Conflict Resolution, which is a merged organization of the Academy of Family Mediators, the Conflict Resolution Education Network and the Society of Professionals in Dispute Resolution (SPIDR).

mediator up to speed with parties and counsel. Advance review of these statements enables the mediator to concentrate at the mediation session on interparty dynamics and facilitating the parties' negotiation, rather than playing informational "catch up" at that session. To encourage candor, these statements are typically presented to the mediator in confidence. Some counsel, parties and mediators might prefer an exchange of these statements between the parties, to begin the process of bringing all parties onto the same page. Some recommend a hybrid approach, in which statements are exchanged, but additional confidential submissions are made exclusively to the mediator, for information that the parties would prefer not to share. Confidential information in this latter scenario might include, *inter alia*, thoughts on settlement proposals; observations about interparty dynamics; information on a party's economic limitations; insurance coverage limits or concerns; strategic thoughts for structuring the mediation process, including the use of caucus or joint session, settlement history, and even case weaknesses.

Pre-mediation statements are typically presented in letter form, rather than as formal briefs. They generally include the core facts, information on inter-party dynamics and the history of the dispute, settlement posture, settlement challenges, thoughts for settlement, thoughts for the mediation process, and identification of the parties who will be attending the mediation. Law is not typically included in great detail, except to the extent it involves a point of law that is likely to be pivotal in the negotiations or in the parties' assessment of the strength and value of their legal BATNA (*i.e.,* their case). Law is also included where there is a sense that the mediator needs to be brought up to speed on a legal schema or framework with which he or she might not be familiar.

Counsel are encouraged to attach key documents to pre-mediation statements, such as contracts, invoices, insurance policies, documents that relate to damages, or any other document that the mediator should see in order to be up to speed with counsel and the parties on the pivotal issues and background. Expert reports, medicals, tax returns, deposition transcripts, key correspondence, invoices, change orders, and summary spreadsheets are some of the wide range of documents that might be useful for a mediator to review in advance of the first mediation session.

Client Preparation

In advance of the mediation, it is wise for counsel to spend time preparing the client. This includes describing the mediation

process and developing a clear understanding of the roles of parties and counsel in that process. Because it is the parties' dispute and an excellent opportunity for the party to obtain non-economic satisfaction through expression and understanding, or to develop business solutions, parties are encouraged to talk in the mediation process. Counsel may work out in advance a system in which the party might comfortably talk until counsel signals that the discussion is entering rough waters or that counsel would like to take the floor.

Counsel should learn not only the facts from the client, but also what the client's needs and interests are. Together, counsel and client can develop a set of goals. This can be an aspirational best deal, then a reasonable deal, and finally the "walk away," *i.e.*, the proposal below (or above) which that party is not willing to go. Of course, it is wise for attorneys to advise their parties to keep an open mind, and to note that these provisional goals might change as more information is developed over the course of the mediation. To aid in the development of these goals, counsel might discuss with the client the strengths and weaknesses of the case and the transaction costs in going forward. This can include a disciplined risk and transaction cost analysis.[2]

§ 3:5 Benefits and limitations of mediation

In considering, recommending or suggesting mediation, sophisticated counsel should know its benefits and limitations.

Time Savings

Mediation saves time. The typical litigation takes years, from commencement through trial or appeal. Preparation for trial takes years, if one includes the discovery phase. By contrast, some mediations are held with virtually no preparation or communication in advance with the mediator, and resolved in sessions lasting one day or less. The REDRESS transformative mediation program, dealing with embedded US Postal Service claims of employment discrimination, is an example of this approach. The majority of REDRESS mediations are resolved in several hours.[1] Commercial mediations, like those associated

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[2]*See,* www.treeage.com for a useful downloadable software program for carrying out a formal decision tree analysis for consideration of probable case outcomes, risks, costs, and values.

[Section 3:5]

[1]See results of study performed by Lisa Bingham on the USPS REDRESS Program, Nabatchi, T. and Bingham, L. B., *From Postal to Peaceful: Dispute*

with federal district court or a Commercial Division or held privately with a professional mediation services provider, generally do involve some limited preparation by the mediator and the parties. Indeed, preparation is essential to effective representation of clients in many mediations.[2] That said, time savings remains a benefit in all mediations.

Cost Savings

Where attorneys are paid on an hourly basis, savings in time generate savings in cost. Many cases that might take years in litigation can be resolved in a single mediation session. That session might last a few hours or go into the wee hours of the morning. In other instances, if the matter is not resolved in the first session, the mediator can follow up by conducting telephone conferences—effectively continuing telephonic caucuses with parties or counsel—and bring the matter to closure through this route. There might also be multiple mediation sessions. Sometimes, despite best efforts to prepare and bring all necessary party representatives to the table, some parties might need to discuss what has been learned at the first mediation session with people who did not attend. Particularly in matters involving municipalities that need board approval, large corporations, and out of state or overseas insurers, there might be a need to seek greater settlement authority from those who were not present at the first session.

In addition, there are times when, despite initial efforts to have all information present at the mediation session, new information is learned for the first time in mediation or it becomes apparent that further information is needed. The mediator can help create a forum where the needed information can be developed as expeditiously as possible, even without formal discovery. Nevertheless, time might be required to obtain certain documents, conduct a deposition, develop numbers for a damages assessment, or consider the viability of a proposed deal. The mediator can follow up during interstitial time as parties process information to maintain momentum and assist in moving the parties to resolution.

Systems Design in the USPS REDRESS(R) Program DOI: 10.1177/0734371X09360187, available online at: http://pubget.com/search?q=authors%3A%22Lisa%20Bingham%22; Bingham, L., *Mediation at Work: Transforming Workplace Conflict at the United States Postal Service*; Report to the IBM Center for The Business of Government (2003); Nabatchi, T., and Bingham, L. *Transformative Mediation in the USPS Redress Program: Observations of ADR Specialists,* Vol. 18 Hofstra Labor and Employment Law Journal, p. 399 (2001).

[2]Preparation for mediation could be the subject of its own chapter.

Whether it is in a single session or after multiple mediation sessions, with or without pre-mediation or post-mediation conference calls, the time spent in mediation and the consequent cost is a fraction of that spent by parties and counsel in full blown litigation, with fulsome discovery; procedural, substantive, pretrial and post trial motions; pre-trial preparation; jury selection; trial; and appeal.

Party Control of Process

Litigation is governed by formal rules of civil procedure. The manner in which parties wend their way to closure is determined well in advance by the rules of the forum. This is true at all stages of the proceedings: pleadings, discovery, motions, trial, and appeal. Rules of evidence and procedure govern not only how information is developed but also how it is introduced at the adjudicative hearing. Any issue on how the parties must proceed at any given juncture is ultimately decided by the judge, magistrate or arbitrator. While counsel might seek an adjournment, it is up to the court whether the request will be granted.

Mediation is a very different process indeed. At critical junctures mediators will take the opportunity to learn what parties and counsel feel is the most constructive way to approach the problems posed by the dispute. A facilitative mediator will ask parties and counsel from the start whether they feel a particular procedural approach would be helpful. Parties and counsel have a say in whether and how to hold pre-mediation communications or provide pre-mediation statements, and whether to participate in joint sessions or caucuses. Parties and counsel are also actively involved in identifying issues and setting the agenda on the order and content of the parties' discussions. To the extent certain information is seen as confidential, beyond the general umbrella of confidentiality that covers the entire mediation process, parties are free to choose what, when and to whom they will make disclosure. They might choose to disclose information to the mediator only in caucus. They might withhold disclosure of certain information until it is obviously needed or until they have greater assurance that the other party is genuinely engaged in deal making. They might decide that it might be helpful to have a meeting of parties only—with or without the mediator—or of counsel only. They might decide it is time to take a break, whether for a brief respite or to adjourn or even terminate the mediation session itself. And, of course, parties have control of what proposals they will make or accept, in short, how to resolve their dispute.

Party Control of Outcome

Litigation or arbitration are binding adjudicative processes in

which a third party—judge, jury or arbitrator—decides the outcome. By contrast, in mediation, it is the parties who decide how their dispute is resolved. Decisions by third parties often please no one. At other times, they produce a winner and a loser, certainly leaving the losing party in far worse position than would have been achieved in a settlement.

In mediation, there is no binding outcome other than one to which the parties agree. Each party is able to avoid the risk of outright loss. Each party may work hard to design a deal that best meets that party's interests—of course, keeping in mind that there can be no deal unless all parties find it acceptable. If no deal is mutually acceptable, the parties are still free to resort to their BATNA, whether it is litigation or not.

Flexibility of Remedy

Many, if not most, civil cases involve claims for damages where no injunctive relief is possible, due to money damages being deemed an adequate remedy at law. Even in cases where injunctive relief is possible, courts tend to be constrained in the scope of the relief that may be had, or the range of factors that might be considered when fashioning this relief.

In mediation, the only limit to possible relief is the imagination, will and capacity of parties and counsel and the structure of reality. Courts do not typically issue damages awards payable over time. Structured settlements are a regular occurrence in mediation, where real economic circumstances may legitimately influence the parties' deal. Courts do not mandate apologies. Parties in mediation may apologize, give letters of reference or recommendation, and generally acknowledge the human consequences and emotional significance of circumstances surrounding or producing a dispute. Courts cannot typically restructure a business, but parties in mediation can.

Building Understanding

Court determinations do not tend to generate either great enthusiasm in the losing party or a sense of greater understanding between the parties. In mediation, by contrast, as Himmelstein and Friedman emphasize, there is a possibility of growth in understanding through dialogue.[3] Parties are able to come to a greater understanding of not only the other party's perspective but also their own interests, motivations and goals, of the legal and business risks and possibilities, and of the surrounding cir-

[3]*See* Friedman, G., Himmelstein, J., Challenging Conflict Mediation Through Understanding (ABA Dispute Resolution Section 2009).

cumstances and realities affecting all parties. Mediation offers a possibility of having all parties leave the room with the sense that "we are all in this together," in lieu of the isolating and alienating sense that there is a winner and a loser.

Relationship Preservation or Repair

The ink of a judgment can etch an indelible rift in the parties' relationship. The recognition and joint decision making possible in mediation can support restoration of interparty harmony.

Reducing Reputational Risk

Many a nasty allegation gets filed in pleadings and motions in court or is aired during trial or publicized with an appellate decision. These same allegations are available to the press, competitors, potential customers, family members, or any party who wishes to review the record.

Mediation, by contrast, is a confidential process. Mediated settlement agreements often contain confidentiality terms, as well.

It is not unusual for certain defendants to express concern that if they settle a case involving one employee or a single transaction, the settlement would set a precedent encouraging future litigation by other employees or in connection with other similar transactions. In fact, the converse is a greater risk: an adverse judgment might truly publicize exposure and encourage future litigation. Adverse judgments can affect entire industries. Confidential settlement in mediation can dramatically limit the risk of a bad, publicized precedent.

Limiting Disruption

Beyond eliminating or reducing public exposure of preferably private disputes, mediation offers the chance to limit other forms of disruption that attend litigation. Officers, employees, customers and vendors need not be served with subpoenas, forced to gather massive quantities of documents or electronic data, or pulled from their workplace to attend depositions or trial. As a consequence, a company's participation in mediation can still the water cooler chatter and lessen anxieties among peripherally interested parties. It can keep key personnel focused on productive work and constructive relations.

Confidentiality and Information Disclosure

There is one added benefit of the confidential character of mediation. As noted above, each party controls the flow of information it chooses to communicate to the mediator or the other

parties. In litigation, discovery obligations must be met, court orders must be obeyed, and opposing or rebuttal evidence must be adduced to avoid adverse consequences. Mediation permits much greater flexibility in the timing, content, and audience for disclosures. The insulting fact that might enrage the counterparty may be tactfully withheld rather than produced in discovery or raised in defense. Negative facts that might emerge later in discovery can be kept confidential through a reasonable settlement proposal. The existence of a business interest—*e.g.*, in exploiting a patent, tradename or brand, developing a territory, obtaining capital, or acquiring a new line, market, or business unit—can be disclosed only to the mediator until it grows clear that there is a deal to be made. Similarly, a settlement option or possibility might be raised first just with the mediator until it has been sufficiently analyzed or the time is right for its communication. That same proposal might be a damaging admission in court, but even when communicated to the counterparty remains entirely confidential.

Another unique benefit of mediation confidentiality is the ability to use the mediator as a double blind to protect trade secrets, customer lists or other information that would not typically be shared with a competitor. Where there is a concern over generating informational asymmetry by providing a disclosure without a corresponding disclosure from the other party, the mediator can be used to confirm to each party that information has been provided before the information is jointly shared.

Limitations of Mediation

Mediation is is no panacea. If a governmental unit or other party seeks to establish a legal precedent that will affect the social fabric or a given industry, some might prefer to do this through a published judgment or order, rather than by confidential agreement that will not have precedential impact on others.[4] In addition, while most matters are resolved in dramatically less

[4]Of course, if sufficient interested parties participate in the mediation, it can more effectively address ongoing problems comprehensively and in a manner that truly and flexibly addresses the interests of all stakeholders. For example, groups like the Environmental Protection Agency have initiated facilitated regulatory negotiations with a wide range of stakeholders to address a complex set of problems that affects a broad and diverse group. *See, e.g.,* Reg03, Encourage Consensus-Based Rulemaking, http://govinfo.library.unt.edu/npr/library/reports/reg03.html. For an interesting review of the question of whether regulatory negotiated rulemaking is effective and can be conducted more effectively, *see,* Fairman, D. *Evaluating Consensus Building Efforts: According To Whom? And Based On What?,* Jan. 1999 Consensus, a joint publication of the Consensus Building Institute and the MIT-Harvard Public Disputes

time in mediation than in litigation, there is no guaranty that mediation will produce a final and binding result. If the need for finality trumps concerns with cost, disruption and outcome, and if there is a strong sense that mediated settlement talks will be futile,[5] counsel and parties might opt to continue in litigation. The question of whether mediation is a preferred process for developing information, some of which might otherwise be sought through litigation discovery, is addressed later in this Chapter.

One misunderstanding that is occasionally raised is that mediation is best where the parties can "get past" emotions and move constructively into deal making. The notion that emotional parties need to be bound by the leash of litigation misapprehends mediation's potential for understanding, empowerment, and recognition. There is a special satisfaction in participating in a process where a party's emotion is not excluded as subjective and irrelevant. Indeed, while instrumental approaches may be disapproved by transformative mediation theorists, the observation still holds that highly emotional parties can find satisfaction in mediation discussions that do enable them to vent and then move on to constructive deal making.

§ 3:6 Discovery and information

There are a variety of reasons we seek discovery in litigation. Discovery develops information on the strengths and weaknesses of one's case, and the strengths and weaknesses of the adversary's case. It reveals what information exists, corrals evidence to present at trial, and, also critically, nails down the absence of evidence on any given point. As noted in the Introduction to this Chapter, the process of discovery itself is an independent force. It can be intrusive; can, through third party discovery, threaten to harm client, friend, or family relationships; can impose tremendous cost on both the party seeking and the party providing disclosure; and can be disruptive to the businesses and people involved.

All of the general reasons for obtaining information in litigation can apply to mediation as well, to the extent that participants

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Program, *republished at* http://www.mediate.com/articles/evaluateconsensusC.cfm.

[5]One *caveat* is that most mediators have a number of stories—particularly in the court-mandated context—of parties or counsel initially expressing certainty that the matter cannot be resolved but ending the mediation with a deal.

in that process "bargain in the shadow of the law."[1] Transformative mediators might urge that the focus is on the parties, their communication and their relationship. Nevertheless, context—including the legal framework—matters in a problem solving approach, where the alternative to an unresolved mediation is litigation. In order to understand the legal BATNA, development of information can be critical.

§ 3:7 The mediation discovery paradox: more information in less time

Information development in mediation presents a paradox. A much wider range of categories of information are developed and significant in mediation than in litigation. We consider more than the legal BATNA and the legal "story" that is woven into the dispute. In addition to the legal shadow, other significant areas for development of information include the parties' interests—business, familial, relational; the business context; economic constraints; emotional issues; principle, goals, aspirations, visions; even deeper questions of identity. All of these can influence whether, how, and in what form a resolution might emerge. The seeming paradox is that, despite this richly varied and nuanced cloud of information, which includes the legal BATNA, much less time and cost is typically spent in mediation than in litigation, not only on trial and appeal, but especially on discovery.

Bypassing Entanglement—Informational Aikido

There is more than one reason that a greater range of information can be developed in a shorter period of time through mediation. One explanation comes from an analogy to martial arts. Litigants can identify a single issue over which counsel might spend months developing competing information and arguments. In a construction case, for example, expert opinions might vary widely on whether work on a neighboring building now requires a multimillion dollar foundation reconstruction, or

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[Section 3:6]

[1]*See,* Mnookin, R.H. and Kornhauser, L., *Bargaining in the Shadow of the Law: The Case of Divorce*, The Yale Law Journal, Vol. 88, No. 5, Dispute Resolution (Apr., 1979), pp. 950–997, published by: The Yale Law Journal Company, Inc.; Stable URL: http://www.jstor.org/stable/795824; Mnookin, R.H., Cooter, R. & Marks, S. *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 Journal of Legal Studies 225 (1982). For a critical review of the question of whether law frames, overshadows, is subject to, or need have no meaningful bearing on parties' bargaining, *see, e.g.,* Jacob, H., *The Elusive Shadow of the Law*, Law & Society Review, Vol. 26, No. 3, 1992.

simply a several thousand dollar repair to cracks in the building's façade. This question can lead to multiple depositions, review of extensive documents, including daily logs, job records, plans and blueprints, Building Department filings, approvals and inspection records, photographs and sketches, not to mention extensive expert reports.

For court, all of this information would be mustered and, to the extent the jury remains awake, the information will be presented to make one or the other of the competing points. During mediation, the same case might be developed through pre-mediation statements, during the initial joint session, and through subsequent caucuses. The form of presentation, however, permits parties more quickly to get to the essence of the matter. Beyond this, there might come a point when parties, claims representatives, and counsel might—with or without the mediator's prodding—wake up. They might conclude that each group could spend hours, if not days, developing, demonstrating, and arguing its point without getting the other group materially to change its perspective or demand. They then might change the game to developing settlement proposals that meet the parties' interests of reducing cost, risk and disruption and finding resolution.

The martial arts analogy here can be to Aikido,[1] and the moves known as *iriminage*[2] or *tenkan*.[3] The gist of these moves is that, instead of directly confronting force with equal or greater opposing force, the practitioner (a) sidesteps the aggressive force and

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[Section 3:7]

[1]Aikido is the most recently developed classical Japanese martial art. It is derived from judo, jujitsu and Iaido (the live sword technique). Its founder, Morihei Ueshiba chose the term "Ai" for its association with love and harmony. "Ki," ("chi" in Chinese) is seen as universal life force and is related to breath. "Do" means "Way." Both spiritual path and martial practice, Aikido fundamentally seeks unification of the practitioner with the universe, non-opposition. Aikido posture is a stable equilateral tetrahedron (like a pyramid) when stationary, and circular movements when in action. In lieu of the sword hilt of *Iaido* is the attacker's hand and wrist. Philosophically and functionally similar to *Tai Chi*, the basic approach of this defensive, non-competitive art is the use of circular movements to go with, and then redirect, the attacker's force, leading to a throw or pin. Ueshiba's view was that an orientation of great love or unity with the universe meant that not speed or force was needed, but that the attacker—whose hostility departs from harmony with the universal—was defeated from the time he initiated hostilities. *See,* Ueshiba, K., Aikido (Hozansha Pub. distributed by Kodansha America, Inc. through Oxford University Press 1985); Ueshiba, M, and Stevens, J. (trans. and compiler), The Essence of Aikido: Spiritual Teachings of Morihei Ueshiba (Kodansha Int'l 1999).

[2]This is also known as the "entering move" or the "twenty year move," due to the time needed for mastery of this fundamentally simple movement.

then enters (*irimi*) or (b) permits the force to stay where it is by pivoting from the point of confrontation to face the same direction as the aggressor (*tenkan*) and then leads the aggressor even slightly further forward in his path of aggression before redirecting the aggressive movement into a more constructive path—one which brings the aggressor under the practitioner's control. The lesson from Aikido is that there are times when it is better to avoid direct engagement with an issue. Many a mediation has been resolved by changing topics. Thinking about damages and transaction costs in a case such as the above construction example can obviate the need to spend a day developing the liability picture. Similarly, where one party cannot pay the bill that a judgment might represent, focusing on that party's economic condition and developing a workable deal for some form of payment, with time terms and security, might be far more productive than discussing either liability or damages. Facts, theories, arguments, legal imbroglios, and discovery battles can pile up around an issue like myriad metal filings drawn to a magnet. Mediation utilizes a neutral professional who can spot this, or encourage parties and counsel to consider this and shift the agenda to the most productive discussion.[4]

Hashing it Out—Directly or with Experts

Another discovery shortcut available in mediation is holding discussions during joint session or even through caucuses. Using the construction example again, in lieu of lengthy discovery, parties could appear at the mediation with their architect, engineer or construction professional, together with pertinent plans, specifications, drawings, photos and contract documents. In short order, under the umbrella of confidentiality provided by mediation, the Owner's architect might hash out with the general contractor, subcontractor or professional engineer associated with another party, what was or was not included in the contract,

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[3]A snapshot demonstration of *irimi* and *tenkan* can be found online at: http://www.youtube.com/watch?v=N7Euz2MFg9U&feature=related.

[4]This is akin to the classic Buddhist tale of a student, Malunkyaputta, who refused to find relief from psychic pain until he had answers to all of life's metaphysical and ontological questions. The Buddha compared this student to a man on a battlefield dying from a poison arrow, refusing to take medicine or permit the arrow's removal until he had learned all details of the shooter, the arrow, and the manner in which he had been shot. By the time he could obtain answers, he would be dead. *Culamalunkya Sutta* of the *Majjhima Nikaya*, Discourse 63, *see* Warren, H. C. (trans.) Buddhism in Translation, Henry C. Warren, ed. (Cambridge; Harvard Univ., 1896) pp. 117–122, passim. Reprinted in Andrea, A. J. and Overfield, J. H. eds., The Human Record: Sources of Global History, 3rd ed., Vol. 1, (New York; Houghton Mifflin, 1998) pp. 77–79.

whether the work conformed to the specifications, or whether a particular installation met code or was reasonable under applicable quality standards.

While working on this problem, parties from both sides of the litigation "v" might sit or stand by the same side of the table, poring over plans or drawings. As one party's expert takes one view, immediately it can be questioned by the other party's expert. Through an iterative process a great deal of information can emerge quickly, potentially and literally ensuring that parties are on the same page. The differences from litigation are apparent with this approach. Rather than conduct an information tug of war, the parties in this scenario take a collaborative approach. This significantly reduces the time, cost and form of information development. In addition, as detailed below, this approach levels informational asymmetry.[5]

Reducing Information Asymmetry

Negotiation theorists make much of the impact informational asymmetry might have on the ability of parties to arrive at a deal. As parties share information in mediation, the domain of their common knowledge increases. The more knowledge they share, the less likely they will disagree over facts relating to the commonly shared knowledge. In addition, lack of knowledge might keep a party from seeing ways to satisfy that party's own interests or to meet the interests of the other party. A more common understanding of the deal or legal BATNA can also reduce the spread in what options for resolution will satisfy all parties.

One clear opportunity for reducing informational asymmetry involves expert reports. There are differences in the degree to which expert reports are required to be produced, depending on whether one is in state or federal court, and depending on whether the expert will testify or not. In addition, some expert reports are more revealing than others. Putting aside cynical interpretations of experts as professionals hired to say what furthers the hiring party's case, it is common for each party, guided by its experts, to have a different view of the science associated with a particular proposition. Having experts speak at a

[5]Asymmetry of information in the bargaining context has been a significant area of study in game theory and is of interest to negotiators in general. *See, generally,* Nash, J., *The Bargaining Problem,* 18 Econometrica 155 (1950); Camerer, C., *Behavioral Studies of Strategic Thinking in Games,* 7 Trends in Cognitive Science 225, 227 (2003); Sally, D.F. & Jones, G.T., *Game Theory Behaves*, The Negotiator's Fieldbook: The Desk Reference for the Experienced Negotiator (Kupfer Schneider, A., and Honeyman, C. editors, ABA Section of Dispute Resolution 2006) pp. 87–94.

mediation can dramatically reduce the knowledge gap between parties. Where parties have legitimately differing views of the risk in a case, it undoubtedly increases the likelihood of a deal to have them close that information gap through the discussions that can be had in mediation.

Going for the Gold: Efficiently Selecting Key Discovery

A repeated theme in studying mediation is that mediation is pragmatic, flexible and holistic. At any given phase, the process can involve meticulous reflection on a single consideration or, conversely, can jump past an isolated entanglement and consider the fundamental questions of what the parties need and how to get the matter comprehensively and finally resolved. With the mediator primarily acting as facilitator, there is no need conclusively to prove a case to anyone. Case assessment must simply satisfy the parties themselves, to the extent they choose to have that satisfaction. There might be times in mediation when it pays to go step by step in the consideration of facts and issues until each party comprehends where all parties stand on a given set of facts and issues and their implications, with the hope that thereafter values might be attributed to each group of facts and issues and a bargain might be struck. At any time, however, the parties are free to agree on an issue without going through the time, burden, and cost of amassing each piece of reliable evidence in admissible form. They have no one to prove it to other than themselves. With the gist of an issue, sophisticated parties can often predict how it will be factually developed and its likely outcome.

Accordingly, parties can shortcut discovery and information development in mediation through focusing on the essential message of a point of fact or issue. They can also identify a core piece of evidence that is likely to be pivotal and focus on obtaining that core evidence. If commercial trial evidence is a mosaic art, established tile by tile, mediation disclosure can, at times, be a Zen drawing—an instantly summoned image that captures the whole.

Plain Inquiry, Plain Talk

Just as the contents of disclosures can be abbreviated, so too the forms by which they are obtained and produced can be simplified in mediation. During a pre-mediation conference call with all counsel, the mediator might seek to get a read of the parties' discovery status, primarily to learn whether the parties have sufficient information to conduct a meaningful negotiation. It is not unusual for a mediator to ask whether, in lieu of formal discovery,

the parties might save time and cost by simply listing the core information needed in a letter, and encouraging the parties to produce the core documents and information needed to put the parties in a position to assess the case and negotiate. Dotting of "i"s and crossing of "t"s might not be essential where the task is getting to the nitty gritty heart of a case.

Greasing the Wheels of Discovery

The mediator is not typically a Special Master appointed by the Court to resolve discovery disputes. Nevertheless, the atmosphere created by the mediation process—which includes not only the mediator but also the attitude and expectation of parties and counsel—tends to be conducive to resolving discovery issues. There is little point in proving the other counsel to be obstructionist where the mediator has no power, will make no ultimate decision (let alone a sanctions decision), and is not tasked with stacking up merits and demerits to be assessed against counsel and their respective parties. Indeed, the mediator's job is to smooth the path to getting to the core point. To the extent parties or counsel think there is benefit in currying favor with this neutral, all indicators suggest that any favor would be found in speeding the plow, candor, collaboration and pragmatism.[6] Thus, the unstated social influence, as well, supports collaborative and efficient sharing of information in mediation.

During the pre-mediation conference call, or at any time during the mediation process, it might develop that counsel believe the matter unripe for mediation. They might, for example, conclude that certain information should be nailed down before a meaningful negotiation can be held. There might be concern that the free ranging and open discussions in joint session, or even through the "telephone" game of inter-caucus communications—where messages are conveyed by the mediator from one room to the next—could empower the other party and counsel with insight into case strategy that might influence future deposition or trial testimony if the case does not settle. Alternatively, counsel might need to consult with management, a Board, or an insurance representative, prior to the mediation, to assess the "BATNA," set a

[6]Of course, the central ethical principle in mediation is party self-determination. *See* ABA/ABA/SPIDR Standards of Conduct for Mediators (1994), revised 2005, Standard 1 (Self-Determination). Particularly when coupled with Standard 2 (Impartiality), a mediator should not be susceptible to favoring any party regardless of whether that party chooses to make greater or lesser disclosure or prefers more or less formality in the means and manner by which information is exchanged. The point above goes to the parties' and counsel's own perceptions and tendencies in the mediation "atmosphere."

reserve, or arrive at a plan of action for the mediation. Counsel might understand the decision makers will be unable to arrive at a meaningful assessment without certain discovery and information in place.

Whatever the reason, the mediator's initial inquiry will likely be whether the information is really seen as necessary or whether from a cost/benefit analysis counsel or the party might prefer to dispense with it. Once it becomes apparent that counsel perceives a need for this information as a threshold matter before mediating, the mediator may facilitate a discussion on timing and logistics. At this juncture, the mediator can help speed the discovery process through setting dates, encouraging effective disclosure by underscoring its utility for reaching a deal, and by keying the discovery schedule to the date of pre-mediation statements and the mediation session. Likewise, even during or after a first mediation session, it might appear that further discovery will enable parties to move past a point of contention. The mediator can similarly help with discussions to arrange for the conduct and swift completion of this discovery.

Forgiveness and Accepting the Unknown

Worthy of brief mention is a topic that has gained traction in the mediation community. Justice based resolutions tend to require information—and hence disclosure—in order to produce assessments that support judgments, either by the parties or to anticipate the outcome of the legal shadow. An alternative solution that can obviate the need for information is forgiveness.[7] It is true that some information can be required to generate the

[7]*See, e.g.,* Sandlin, J.W., *Forgiving in Mediation: What Role?* (Advanced Solutions Mediation & Conflict Management Services, Charleston, South Carolina 29402) http://www.apmec.unisa.edu.au/apmf/2003/papers/sandlin.pdf; Braskov, S. & Neumann, A., *On Guilt, Reconciliation And Forgiveness—A Case Story About Mediation, Dilemmas And Interventions In A Conflict Among Colleagues* (Lipscomb University Institute for Conflict Management), http://www.mediate.com/articles/BraskovNeumann1.cfm; Schmidt, J. P., *Mediation and the Healing Journey Toward Forgiveness*, Conciliation Quarterly, 14:3 (Summer 1995), pp.2-4; Della Noce, D. J., *Communication Insight*, ConflictInzicht, Issue 1, February 2009; Luskin, F, Forgive for Good: A Proven Prescription for Health and Happiness (HarperCollins 2002), used in trainings on forgiveness in mediation, *see, e.g.*, http://danacurtismediation.com/dcm/forgivenessyrslater.html; and Waldman, E. & Luskin, F., *Unforgiven: Anger and Forgiveness*, The Negotiator's Fieldbook: The Desk Reference for the Experienced Negotiator (Kupfer Schneider, A., and Honeyman, C. editors, ABA Section of Dispute Resolution 2006) (hereinafter "Negotiator's Fieldbook") pp. 435–443.

apology[8] that might prompt forgiveness. Yet, for other information, we might apply the old adage: to forgive is to forget.

Similarly, even without forgiveness, negotiators can reach a point where they accept the fact that they will not or cannot know every detail pertinent to an assessment of a case, to understanding the root causes and circumstances pertaining to a dispute, or to the value or feasibility of a deal. Nevertheless, they take a deep breath and accept a deal despite a recognized lack of information. Thus, as a corollary to reducing informational asymmetry, simple acceptance of the unknown, and acceptance of the attendant risk, permits many parties to reap the reward of a resolution. This, too, ends the need for further discovery.

§ 3:8 Developing information in mediation

While we have focused on the way in which mediation expedites and truncates the process of obtaining discovery, there are circumstances when more time is afforded to a particular informational need. Take our earlier example of the construction mediation and a dialogue of experts. During the course of discussions, a question might arise concerning the roof of the building in question. It can be quite constructive to take a break to schedule a site visit by the experts, with the understanding that the mediation will reconvene soon thereafter with discussions clarified as a result of the visit. There is any number of good reasons to adjourn a mediation session in order to permit the development of information. These can include: retaining an expert who might or might not attend the next mediation session; taking the deposition of a key witness; impleading and obtaining discovery from another potentially liable party; obtaining tax or other financial information relating to an economically challenged party; developing further information on liability or damages; and developing information on the value or feasibility of a proposed deal. The decision to adjourn and seek further information is typically preceded with some type of cost/benefit analysis. We have stressed that there are times when it pays to accept the unknown or to overlook an issue. Nevertheless, mediation is not a

[8]*See, e.g.,* Gerarda Brown, J. & Robbennolt, J.K., *Apology in Negotiation*, Negotiator's Fieldbook, pp. 425–434; Schneider, C.D., *"I'm Sorry": The Power of Apology in Mediation*, (Association for Conflict Resolution Oct. 1999), http://www.mediate.com/articles/apology.cfm; Kichaven, J., *Apology in Mediation: Sorry To Say, It's Much Overrated*, (International Risk Management Institute Sept. 2005), http://www.mediate.com/articles/kichavenJ2.cfm; *and also see*, Garzilli, J.B., Bibliography of articles on apology in mediation, http://www.garzillimediation.com/pg247.cfm.

one note Johnny. As an expression of party self-determination and to promote understanding, the mediation process should be held at the ready to serve the parties' legitimate needs for further information.

Collaborative Information Development

Furthering the previous observation, mediation ideally can foster the collaborative approach to negotiation lauded by Fisher and Ury.[1] Thus, in mediation, parties are encouraged to share information, while respecting their freedom to control their own acts of disclosure and their strategic assessments. Fuller disclosure means that parties are making decisions with their eyes wide open. This reduces anxiety and generates a greater sense of fair dealing. Some helpful approaches to reduce informational asymmetry, and to provide all parties with the ability to make clear choices, include: preparing and exchanging binders with key documents; preparing damages spreadsheets with backup; sharing videotapes or DVDs of key facts[2]; sharing key emails; and sharing mirrored hard drives with software rendering the data searchable.[3]

§ 3:9 Confidentiality and disclosure

One hallmark of mediation is that it is a confidential process.[1] The purpose of this protection is to encourage parties and counsel to speak freely and foster open discussions aimed at understanding, reconciliation, problem solving, and resolution. It is intended to diminish the chilling affect on candor and creativity that attends the fear that admissions will be used against a party in court if the matter is not resolved in mediation. Apart from these general benefits, confidentiality in mediation affords parties some unique opportunities for handling disclosure.

[Section 3:8]

[1]*See* Fisher, Roger and Ury, Willliam, Getting to Yes: Negotiating Agreement Without Giving In (New York, NY: Penguin Books, 1983).

[2]Videos could show: a plaintiff in a personal injury case performing tasks which he claims he is disabled to do; a detailed walk through of the building site in question in a construction case; a walk-through of a ship in an admiralty case; the scene of a fire or flood loss; any number of imaginable damaged or defective goods; etc.

[3]The parties can agree to share the cost of this discovery. They might also defer the question of cost sharing until later in negotiations, to be wrapped up in a comprehensive settlement.

[Section 3:9]

[1]*See* ABA/ABA/SPIDR Standards of Conduct for Mediators (1994), revised 2005, Standard 5 (Confidentiality).

Skimming Cream from the Milk: Using Confidentiality to Draw Benefit from Information without Risky Disclosure

There are times when parties are simply uncomfortable sharing information with the other party. A recurring case of this discomfort arises in unfair competition cases. One party might accuse the other of taking a customer list or of doing business with customers who are off limits under the terms of a non-compete agreement. While each competitor refuses to show its list of customers to the other, they might be willing to share their list with the mediator. The mediator can commit not to disclose the names of customers or other sensitive information, such as pricing, profit margins, or the size of a piece of business. Nevertheless, armed with this information, and subject to the disclosing party's approval, the mediator might, for instance, be able to share his or her observation that there are no, or just a limited number of, overlapping customers. This observation can work wonders in getting parties past a standoff in an unfair competition case. Another common use of this mechanism is financial disclosure. One party may share financial information with the mediator to demonstrate inability to pay, the uncollectiblity of a judgment, or lack of resources to support a hefty punitive damage award. At times, the mediator might be able generally to confirm that there is a difficulty without all of the confidential information making its way into the hands of the other party.

Disclosures Made Solely for the Purpose of Mediation

There might also be times when parties are willing to make disclosures in the resolution focused mediation context, but are unwilling to do so in litigation. The development of financial information concerning a debtor, discussed immediately above, provides a good example. Solvency information is typically not a part of discovery during the case in chief, but rather awaits entry of a judgment and supplementary proceedings to enforce that judgment. Nevertheless, some debtors might be willing to permit the creditor to jump the line within mediation and see this information, with the understanding that this information may not be used for any other purpose if the case is not resolved. The one caveat is that once this information has been disclosed, if the mediation terminates without resolution, nothing prevents a party from serving a discovery demand or asking questions in a deposition which are designed to elicit this information.

Far Broader Range of Information

The range, depth, texture, and type of information that is pertinent to the parties and can be developed legitimately in

mediation is far greater than that traditionally sought in discovery. Thus, it is good for counsel and party representatives to keep in mind that they are seeking to develop this wider assortment of information in mediation; mediation-based disclosure is not just an adjunct to litigation discovery.

Mediation is a facilitated negotiation. Therefore, the information sought is that which will help parties be effective in negotiation. Certainly, that information includes the legal BATNA. But beyond this, information should be developed, where possible, to help each party understand the other party's perspective, interests, feelings, values, goals, principles, sense of self (or identity) circumstances, position in impinging hierarchies, leverage, financial condition, and any other type of information that will aid one's party in making a deal. At its heart, the process involves a search for ways to meet the interests of all parties—to fashion options that might approximate the Pareto optimum, if possible.

Discussions in mediation will include brainstorming sessions to generate these options. During brainstorming, to enhance creativity, parties put aside judgment and willingly suspend disbelief. These sessions can be followed by more carefully evaluative sessions, where the various options are tested against reality for feasibility, and where their value is judged against legal or business alternatives. If a proposed deal involves a license grant, the feasibility of that license's being effectively and productively exploited can be tested. If it is a license to develop a certain territory, parties can seek market studies, can test the validity of the intellectual property rights, and can consider economic figures for any business unit that might be bought or sold in connection with the deal.

In short, a wealth of information other than what is typically developed in discovery may be uncovered in mediation.

§ 3:10 The spigot of disclosure

We have seen that information is the currency of mediation. The greater one's information, the greater one's power to find common ground, identify interests, see deal possibilities, understand the degree to which the other party might have flexibility, assess and apply leverage, and judge the value and feasibility of a proposed deal. The universal recognition that information is power tends to make parties wary when making disclosures, whether the disclosure is of case related information or of pure negotiation related elements. In short, people hesitate not only to disclose case weaknesses, but they also hesitate to

disclose their own wants and needs out of concern that these are personal weaknesses in the bargaining arena. Ironically, just as Uncle Sol could not have arrived at the Pareto optimal division of 12 orange rinds and 12 orange pulps for Susie and Sally, negotiators cannot generate options that meet the other party's needs if those needs are not disclosed.

Similarly, lawyers are often hesitant to reveal the "smoking gun"—that surprise fact which will dramatically advance the ball in support of their case. They fear that the other side will counteract this evidence more effectively if it is revealed in advance of trial. Yet, without sharing this piece of the other party's legal BATNA, the party whom this evidence favors loses the ability to demonstrate that a proposed deal is a good one in light of the negative impact this information has on the adverse party's legal alternative.

One further challenge in disclosure is the lack of knowledge of just how much value the other party is willing to concede in order to make a deal. The term "zone of possible agreement" (ZOPA)[1] can be used to represent the range of the greatest concession of each party to a potential deal. The risk that there is a large ZOPA, generates reluctance to be the first to communicate a proposal, for fear that one is cutting off the chance of reaching a higher level of concession from the other party. Conversely, if there is a narrow ZOPA, failure to make disclosure might lead to a standoff as each party rightly perceives that the proposed deals are falling outside that party's possible concession range.

The examples above demonstrate the challenges in determining whether, when, and to what degree a party should be willing to make a disclosure. It is a psychological truism that self-disclosure builds intimacy, and that disclosure by one party increases the likelihood of disclosure by the other party. Essentially, one must give to get. At each juncture negotiators can engage in a cost/benefit analyses to assess whether disclosure, or nondisclosure, is worth the risk.

§ 3:11 Mediating discovery disputes

The focus of this Chapter, consistent with the focus of mediation itself, has been on the development of information within the

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[Section 3:10]

[1]This term, as "zone of potential agreement," was likely coined in Lewicki, R.J., Minton, J., and Saunders, J., in Negotiation (3rd Edition. Burr Ridge, IL: Irwin-McGraw Hill, 1999). *See, also,* http://www.beyondintractability.org/essay/zopa/.

mediation context, both of the litigation discovery type and of the broader range of information that is expressed and significant in negotiation. The pragmatic and holistic nature of mediation tends to recognize that each piece of a discussion is not simply compartmentalized, but can be related to a much larger whole. Therefore, if a discovery dispute arises, it is natural for a problem solving mediator to look at the broader picture and wonder whether this is really essential, or whether it also provides an opportunity for shifting focus to resolution of the overall dispute itself. A transformative mediator will be inclined to see not only the statement being made about the discovery, but also to recognize the tone and choice involved in the communication as indicative of the quality of the parties' relationship at that moment. An understanding based mediator will see opportunities for understanding of persons and context well beyond the confines of the particular discovery dispute. Essentially, to lift a pebble in mediation is to embrace, and be embraced by, the world.

Despite this wonderful quality of mediation, nothing prevents parties or a mediator from being able to mediate a narrow set of issues, such as a discovery dispute within the litigation context. The mediator may apply the same skills of facilitating dialogue, aiding the parties in communicating their interests in the discovery, or nondisclosure, in question, helping them work to find options that meet their interests, supporting them in applying standards to work through the choice of how to resolve the dispute, and aiding them in the consideration of alternatives to proposed deals. Consideration of the BATNA in the discovery dispute can range from asking about the costs of litigating the discovery battle, the costs of discovery itself, the way the trial judge or magistrate might be predicted to rule, the impact on the judge of being presented with this problem, risk of sanctions, and the consequences of getting more or less of the discovery sought.

Mediators can be used to help resolve discovery disputes at any juncture. They can be called in well in advance of the mediation, can be engaged in connection with preparation for the mediation, can address a discovery dispute during the course of a mediation session, and can even be brought in to help the parties work through a discovery dispute after a mediation has been adjourned or put into hiatus during a subsequent substantial period of discovery.

Fortunately, because of the holistic and pragmatic nature of mediation, at any point during any of these discovery disputes, the mediator can also test to see whether the parties are open to having broader and more end-game conclusive settlement discussions. As a function of party empowerment, if the answer is

that parties prefer to focus the discussion on the discovery dispute itself, the discovery dispute will be the focus of that mediation session.

§ 3:12 Use of evidence and proof in mediation

We can here underscore what has been said throughout this Chapter. Mediation is a flexible, informal process, in which it is not necessary meticulously to lay out a case with each properly introduced and admitted mosaic tile of evidence. By contrast, we have also seen that information, including discovery and even evidence, can play a very meaningful role in mediation. All participants in mediation seek quickly and directly to get to the point, to the heart of a matter. In this regard, there are a variety of ways in which evidence, and the use of evidence, comes into play.

Evidence can be found in virtually all stages of mediation. It can be annexed to the pre-mediation statement. It can be shared in the opening joint session. Throughout the balance of the mediation session—both in joint session and in caucus—evidence can be considered and reconsidered, and new evidence can be introduced.

At any juncture the parties might discuss and consider the weight, credibility, implications, and significance of a piece of evidence. Even though admissibility is not a bar to discussing evidence or information in mediation, it might be a very significant topic of its own concerning a certain piece of information in mediation. For instance, the question of whether a 30 year old bordereaux in a reinsurance liquidation case will be admissible at trial as a hearsay exception under the ancient documents rule might have tremendous significance in discussion of a multimillion dollar claim that will rise or fall on the strength of the bordereaux.

As mentioned earlier, where one party considers a piece of evidence to be a smoking gun, that evidence might be discussed with the mediator alone in caucus. This can place the mediator in the awkward position of being authorized to tell the other party, in separate caucus, that the mediator has seen evidence which has a negative impact on that party's case, but that the mediator is not at liberty to elaborate about the sum, substance or provenance of the evidence. Many a party or counsel might respond by saying that they can give this no weight without further detail. Therefore, the mediator's reality testing with the party who possesses the smoking gun might be critical to assessing whether and when that evidence can be used to advance the negotiation ball.

One pattern that can emerge is increasing disclosure and assessment of evidence as the mediation proceeds, followed in the latter portion of the mediation, with a greater focus on deal making. Where one party initially believes that the other party has not been forthcoming with evidence, that party might seek to hold certain evidence pending provision of evidence by the other party. A corollary phenomenon is the expression of concern by one party that the other party is simply using mediation as "free discovery." In each instance, one value the mediator brings is finding ways to encourage parties to take modest risks to get the disclosure ball rolling. Observing that disclosure breeds disclosure and supporting parties' engagement in cost/benefit analyses can be helpful here.

It is helpful to keep in mind that resolution in mediation is achieved by the parties themselves. Sharing significant evidence with the other party, and using it in a meaningful way to demonstrate that power of the shadow of the law, can be well worth the effort because it may create the impetus to bring the matter to closure.

§ 3:13 Conclusion

Mediation is a flexible, party driven process that enables participants to address problems of minor and major magnitude. Parties may use it to address a discovery dispute within a litigation; to handle the development of information—both related to the case and related to the parties, their circumstances and their deal; and to resolve the underlying dispute that prompts counsel's discovery efforts. Whether, and when, the parties and counsel choose to use a microscope or a telescope is entirely their own decision. Mediation not only helps with the use of these tools, but also helps parties recognize and reflect on the value of the choice of which tool to use.