

MEDIATION IN THE WORLD OF COMMERCIAL DISPUTE  
LITIGATION: AN INSIDE LOOK AT THE  
CHALLENGES FOR COUNSEL, MEDIATORS, AND  
INSURANCE CLAIMS PROFESSIONALS

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INTRODUCTION AND PROJECT OVERVIEW

Participants in commercial mediations report numerous challenges and concerns that reflect the professional roles they play as legal advocates, counselors and risk managers of litigation. For example, although attorneys are challenged by opposing counsel, they also confront tensions with their clients. Insurance claims professionals and other representatives who manage litigation risk for large institutions are concerned with their insureds' exposure to liability, objective damages, and potential defense costs. Mediators perceive and respond to challenges that seem to concern no one else. All the while, each participant maintains definite opinions regarding what others should and should not do when faced with challenges in the mediation. Opinions and expectations vary regarding what constitutes "good" mediation and how disputes should best be resolved.

To investigate these perceptions and their implications, I undertook a qualitative research project examining the challenges, frustrations, and concerns faced by participants during the mediation of litigated commercial disputes. For the purposes of this study, the terms "challenges," "frustrations," and "concerns" are defined as anything that impedes the parties from achieving their goals in mediation—whether the parties intend to resolve a dispute, repair relationships, improve communication, or send

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signals to each other concerning the litigation. While many have written about the mediation process in recent years, there have been few qualitative surveys of mediation participants. The broad, subjective nature of the inquiry prompted free-flowing insights from participants in my survey.

Personal interviews were conducted of forty-three civil litigators in the Baltimore-Washington, D.C., metropolitan area, nineteen mediators (seventeen of whom are members of the International Academy of Mediators (IAM), which requires a minimum of four hundred commercial mediations for membership), and ten insurance claims professionals and other representatives who manage litigation risk for large institutions. The interviewees were mostly individuals I knew prior to the interviews. Interviews were conducted in person or by telephone between July and November 2019. The responses are anonymized.<sup>1</sup>

The practice of commercial mediation has aged, and it has changed—rightly or wrongly—in response to the demands of users who pay handsomely for mediation services.<sup>2</sup> This survey suggests that, with increasing frequency, mediators and parties do not control the process—attorneys and insurance claims professionals do.

What emerges from this project is a study in contrasts, similar in some respects to the paradox Professor Bernard Mayer describes between competition and cooperation.<sup>3</sup> Participants say that they want to cooperate and trust each other, but they engage in competitive steps to prevent this, such as withholding critical information from the other side, overconfidently predicting their success at trial, and misleading their counterparts as to what will resolve the dispute. They claim to want fewer frustrations for themselves and, at times, their opponents when bargaining, but they posture and fend off meaningful moves from party opponents. Plaintiffs say they want meaningful responses from opponents, such as a “real” offer, for example, but they fail to make “real” demands, and they

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1. The implications of this study should not be limited to the geographic region of Baltimore and Washington, D.C. Based on my conversations with claims professionals, mediators, and attorneys from various regions of the United States, I believe that many lawyers, mediators, and insurance claims professionals encounter similar challenges and frustrations with participants in their markets throughout the United States. See RANDALL KISER, *HOW LEADING LAWYERS THINK: EXPERT INSIGHTS INTO JUDGMENT AND ADVOCACY* 75-86, 172-201, 208-17 (2011).

2. Jeffrey Krivis, *The Settlement Drift*, *MEDIATE.COM* (June 2014), <https://www.mediate.com/articles/KrivisSettlementDrift.cfm> [<https://perma.cc/AJN3-WUZQ>].

3. BERNARD MAYER, *THE CONFLICT PARADOX* 25-59 (2015).

make misleading moves in response to decent offers. Defendants say that they want realistic demands, but they fail to make realistic offers, and they take advantage of plaintiffs when decent demands are made. Lawyers marvel at magical, miraculous developments in mediation, but they criticize processes that bring them about. They want to achieve good results for themselves and their clients, but they do not want to invest the time and effort. Mediators wish more “good” counsel existed. Lawyers wish more “good” mediators existed, but they are reluctant to consider mediators who are new to them—even if the mediator is reputable.

Part I presents the challenges reported by attorneys and insurance claims professionals. Part II reviews the ways in which mediators offer assistance to participants. Part III explores the challenges mediators encounter and their responses. Finally, Part IV outlines how mediators frustrate attorneys and claims professionals.

## I. CHALLENGES ENCOUNTERED BY ATTORNEYS AND INSURANCE CLAIMS PROFESSIONALS

### *A. Mistrust of Opponents*

#### *1. A Pervasive Problem*

Lawyers report mistrust of their opponents as a pervasive challenge; it is responsible for most of the frustrations discussed in this article. For lawyers who invest significant time and resources in managing legal or factual issues in a case, mistrust of opponents only increases costs. For these attorneys, personalities determine the tenor of mediation and its outcome. One lawyer said, “Tell me who is on the other side, and I’ll tell you whether I’ll encounter challenges and which ones are most likely to occur. That’s why relationships matter.”

Although good reasons may justify some level of skepticism between opposing counsel, as explained in the next subsection, mistrust can negatively impact counsel’s ability to assess risk and bargain effectively, placing “attorneys in ‘untenable’ negotiation positions.”<sup>4</sup> When attorneys trust each other, though, they generate better outcomes for themselves and

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4. KISER, *supra* note 1, at 166 (2011).

their clients. Respondents reported experiences with trusted opposing counsel as less frustrating and more rewarding.<sup>5</sup> As stated by a personal injury attorney, “If we know and trust counsel on the other side, they get better numbers from us.”

On a broader level, facilitated in part by professional membership groups for the plaintiffs’ and defense bars,<sup>6</sup> mistrust is fostered between advocates for injured parties and medical providers. One risk manager for a large hospital system asks why the plaintiffs’ bar maintains such hostility toward medical professionals: “Why the over-the-top competition with us? Doctors and nurses make sacrifices in their lives and actually want to help people. Not every mistake is premeditated or a cover up.” On the other hand, based on my experience mediating medical negligence disputes, many plaintiffs’ lawyers assume medical records are missing or have been altered.

## 2. *Dysfunctional, Yet Rational, Behaviors That Flow From Mistrust*

When opposing counsel and parties mistrust each other, a number of dysfunctional problems appear. Defensive or offensive tactics emerge, such as

pressing arguments known to be specious, concealing significant information, obscuring weakness, diverting attention from the main evidentiary risk, misleading others about the existence or persuasive power of evidence not yet presented (experts, fact witnesses), resisting well-made, client-responsive suggestions, injecting hostility, remaining attached to positions not sincerely held, delaying access to information sought by other parties, and protracting the proceedings to wear down the other side.<sup>7</sup>

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5. See also Wayne D. Brazil, *Reciprocal Coaching to Reduce the Risk of False Failure in Mediation and Support from Social Science for Coaching Ideas*, 29 OHIO ST. J. ON DISP. RESOL. 167, 203 (2014) (discussing the “positive relationship” that tends to exist “between levels of trust and sharing information”); John Lande, *Getting Good Results for Clients by Building Good Working Relationships with “Opposing Counsel,”* 33 U. LA VERNE L. REV. 107, 107 (2011).

6. See, e.g., AM. ASS’N FOR JUST., <https://www.justice.org/> [<https://perma.cc/NVT5-2K8P>]; DEF. RES. INST., <https://www.dri.org/> [<https://perma.cc/FE58-J5TC>].

7. Robert P. Burns, *Some Ethical Issues Surrounding Mediation*, 70 FORDHAM L. REV. 691, 706 n.50 (2001) (quoting Wayne D. Brazil, *Continuing the Conversation about the Current Status and the Future of ADR: A View from the Courts*, 2000 J. DISP. RESOL. 11, 29).

One dysfunctional behavior reported by lawyers with some regularity was withholding and hiding information, including what their clients would accept to settle the case.

Lawyers and parties claim they want to negotiate openly with opponents who are less litigious and adversarial and more oriented toward solving the problem at hand, but, as indicated in the dispute resolution literature, they admit to withholding some information in the event a trial is necessary.<sup>8</sup> One senior adjuster responds to that dilemma by asking, “Why hold back the ‘dooms day’ fact? How else do you plan to convince me?” Unveiling unexpected information or evidence during mediation will not land well with most senior insurance adjusters. Worse, it may backfire and derail the process. One adjuster responds to the tactic by dismissing the evidence and shutting down the mediation. He says, “I give it zero weight. If that’s your main point we’re done for the day.”

On the other hand, in the context of bargaining over limited resources, such as insurance policy proceeds, perhaps parties should not be completely honest with each other in all cases.<sup>9</sup> Some mediators claim to witness overly competitive responses to “reasonable” demands. As they report it, “no good deed goes unpunished.” Important ethical issues are raised in distributive bargaining contexts where one party’s gain is another’s loss.<sup>10</sup> One party’s “reasonable” opening position is often exploited by her opponent.<sup>11</sup> Full and candid disclosure may feel altruistic, but it surrenders valuable information the other side wants to know.<sup>12</sup> The needs and fears of a party “ought not . . . determine the price” one gets.<sup>13</sup> For example, an “opponent has no right

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8. Michael R. Hogan, *Judicial Settlement Conferences: Empowering the Parties to Decide Through Negotiation*, 27 WILLAMETTE L. REV. 429, 442 (1991) (explaining how distrust of opponents leads to suspicion they are acting competitively); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 782 (1984) (“Trial lawyers may fear releasing information in pre-trial negotiations because of the presumed loss of advantage at trial.”); Michael E. Dickstein, *Strategy or Bad Habit? Avoiding Lawyers’ Most Common Mediation Pitfalls*, INT’L ACAD. MEDIATORS BLOG (Oct. 26, 2018), <https://iamed.org/blog/strategy-or-bad-habit-avoiding-lawyers-most-common-mediation-pitfalls/> [<https://perma.cc/HLP9-SG6H>] (explaining how “surprises” at mediation “leave the other side feeling suspicious, betrayed, concerned about other information being withheld, and unwilling to make a decision at the mediation”).

9. See also Burns, *supra* note 7, at 692-93 (explaining how each side benefits by misleading the other).

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

to know” whether or not the other side is afraid of trial or needs to settle by a certain date.<sup>14</sup> In this author’s opinion, until some degree of trust in the mediator and in the mediation process is established, there are sound reasons to conceal some information and outcome goals based on mistrust of the other side, especially in distributive bargaining contexts.

*B. Disinterest in Resolution and Lack of Authority of Attendees*

Almost all interviewees expect the mediation process and the mediator to help them resolve the dispute. Thus, lawyers are frustrated when they believe their opponents in mediation are not interested in a resolution.<sup>15</sup> In response to being “burned” before, one plaintiffs’ attorney asks, “Why pay for private mediation only to offer nothing?” Another plaintiffs’ attorney reports that he asks the defense to make an offer before the mediation session.

Some mediators are aware of the problem. As one describes, “People come with agendas. What’s going on? Are they really trying to settle? Who’s driving this?” Despite the best of intentions, however, mediation is sometimes used to gather information<sup>16</sup> or send strong messages about legal positions.<sup>17</sup> Even though many respondents complain about opponents who use mediation without an intention to settle, none of them admitted to employing the same tactics. Mediators cannot control the ways in which parties use the process, but they can try to determine how the parties may intend to use it before they meet, as described below.<sup>18</sup>

Responding attorneys want opposing parties, especially insurance claims professionals, to appear in person with adequate authority to resolve the case. They expect the mediator to be a stickler on this point and hold accountable lawyers who appear with a surprise announcement that their client, or key adjuster, will be available only by phone. Even when adjusters appear in person, however, plaintiffs’ counsel may doubt whether the

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14. *Id.*

15. *See also* DAVID FRANGIAMORE, HOW INSURANCE COMPANIES SETTLE CASES 7-3 (James Publishing 2019) (warning that some parties do not negotiate in “good faith”).

16. *See also* KISER, *supra* note 1, at 217 (quoting a defense lawyer complaining about misusing mediation to obtain added discovery and leverage plaintiffs to force lower settlements).

17. *See also* FRANGIAMORE, *supra* note 15, at 1-3 (justifying mediation to convey the carrier’s denial of coverage).

18. *See also infra* Section II.A.

adjuster has adequate authority to resolve the case.<sup>19</sup> Adjusters report that their carriers are interested in closing the claim file but not without knowing what the claimant may accept short of trial. Perhaps it is this inquiry (what the plaintiff will accept short of trial) that frustrates plaintiffs' counsel and creates the impression, at times, that some adjusters use mediation to obtain additional discovery or lack adequate authority to resolve the case.

"Serious" discussions are important, according to respondents, but what passes for seriousness is a matter of individual interpretation. For defense counsel and insurance carriers, plaintiffs seem serious about settling when their demands are "realistic" and when they reduce their demands over the course of the mediation. One senior adjuster points out, "Concessions are necessary; otherwise why mediate?" For plaintiffs' counsel, carriers appear serious when they offer enough money to make litigation look worse than settlement, or as one plaintiffs' lawyer observes, when they leverage "the fear that we might lose or get less at trial." One plaintiff's lawyer who specializes in medical malpractice litigation believes that serious negotiations do not happen often enough. In his opinion, carriers typically use mediation to lowball plaintiffs and "just try to settle for less than their authority."

### *C. Posturing and Overconfidence*

Respondents were particularly frustrated by the ways in which their opponents negotiate and bargain. Unreasonable demands and offers, along with small, incremental moves, frustrated respondents in this study and in others.<sup>20</sup> Some adjusters reported that they believe that extreme bargaining positions can be a sign of overconfidence. They respond to blustery, overconfident attorneys and parties with lower offers, scheduling inconveniences, and legal opposition in the form of motions and procedural challenges. One adjuster cautions, "Drink your own Kool-Aid and you lose credibility in our eyes." Adjusters see overconfidence by plaintiffs' counsel as a danger that can backfire. Risk managers for a large hospital system said,

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19. See also FRANGIAMORE, *supra* note 15, at 1-9 (explaining carriers "usually do not give most adjusters enough settlement authority for many of the claims they handle").

20. See also KISER, *supra* note 1, at 185 (reporting comments from attorneys who believe the most significant obstacle to resolving cases is "excessive plaintiff demands and lowball defendant offers").

“They have more to lose than we do. We are insured and won’t go out of business. They have no safety net.” Because overconfidence adds time to the process, it can backfire, allowing unexpected misfortunes to occur. For example, one risk manager recalled a case where a claimant died before trial, a fatal blow to the case because the decedent would have been a central fact witness.

Lawyers believe that it is important to maintain a high level of confidence in one’s case.<sup>21</sup> Of course, practically speaking, it can be difficult to know when one’s own confidence is overblown, impeding one’s ability to assess risk. In mediation, lawyers often pretend not to be concerned about weaknesses in their cases,<sup>22</sup> a tactic that challenges all participants. Perhaps it is no surprise that not one attorney participating in this study admits to being overconfident. Similarly for claims professionals, overconfidence can creep into the case assessments of carriers, but the degree to which they are aware of this heuristic may be another matter. Only one senior insurance adjuster admits that “internal discussions [within the carrier] can be an echo chamber” where few, if any, critics feel safe enough to express contrary valuations.

#### *D. Lack of Preparation by Opponents and the Mediator*

Lawyers report an expectation that their opponents will prepare for meaningful settlement discussions, especially when the parties engage in private mediation. Most plaintiffs’ attorneys believe defense counsel and insurance carriers are prepared when a senior adjuster appears and makes a decent opening offer. Defense attorneys expect plaintiffs’ counsel to know if applicable medical care liens can be compromised<sup>23</sup> and are frustrated at mediation when this information is not available.

Additionally, lawyers report irritations with mediators who fail to prepare. They expect mediators to digest pre-session materials and be conversant with all legal and factual issues. Some lawyers also expect

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21. See also KISER, *supra* note 1, at 173 (quoting an attorney, who stated, “Never take a judge’s evaluation of your case if you believe in your case.”).

22. See also *supra* note 7 and accompanying text.

23. See FRANGIAMORE, *supra* note 15, at 5-35, § 581.1 (explaining that most medical care providers assert a claim or a lien against the injured person’s settlement proceeds and that “lienholders will usually accept a negotiated number less than the full amount owed simply to avoid the litigation or transactional costs to enforce the lien”).

mediators to anticipate problems before the day of the mediation. For example, when multiple parties are involved, lawyers think it is a good idea to start the mediation process early to address competing opinions of allocation. Surprisingly, given the oversaturation of mediators in most markets, many lawyers report that some mediators fail to prepare and appear disinterested in the details of cases. These mediators apparently expect the mediation session itself to sufficiently motivate each side to move off of their bargaining positions.

#### *E. Mismanagement of Client Expectations*

A common challenge reported by attorneys is managing client expectations. Although attorneys expect each other to posture during settlement talks, clients do not perceive the rhetoric as posturing; they take it at face value. As one attorney put it, “that’s why we need a good mediator—to help me and my clients save face.” Defense attorneys believe that their colleagues on the other side do not do enough to manage or readjust their clients’ expectations. Risk managers are skeptical of the claim from plaintiffs’ counsel that they “don’t have control over [their] client.”

Even so, counsel and adjusters are frustrated by mediators who are unable to readjust everyone’s expectations and generate movement. Retired judges are commonly called into cases where the attorney hopes to readjust unrealistic expectations on either side.<sup>24</sup> This is not always successful, because many retired judges fail to develop a broader set of skills critical to make mediation a meaningful process for counsel and parties.<sup>25</sup> As one mediator reports, “Many attorneys are dissatisfied with retired judge mediators. They have no patience. They treat mediation as a courtroom. They don’t have fundamental mediation skills and can’t perform the basics such as listening, developing rapport, being creative, etc.” Another mediator reports, “By the time the attorneys hire a retired judge, they missed the boat. The attorneys failed to listen to the needs of their clients. But some people may need to hear from a judge. Some want a retired judge who just beat the shit out of participants.”

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24. KISER, *supra* note 1, at 211-12 (listing reasons for choosing retired judges as mediators, including that clients respect them and lawyers think they are smart).

25. *Id.* at 212 (recounting criticisms from attorneys who believe some judges are “unfriendly, self-absorbed or self-important, and/or lack[ing] empathy”).

*F. Conflicts of Interest Between Counsel and Clients*

Responding lawyers are frustrated by actual or perceived conflicts between opposing counsel and clients. Some lawyers report that although they may recommend settlement, their clients or carriers may not be interested in resolution, or may act too aggressively when negotiating a deal. In the eyes of some in the plaintiffs' bar, defense lawyers are more accountable to carriers rather than their insured clients. Although impasse may be caused by a legitimate conflict between attorney and client over valuation, negotiation strategy, or something else related to counsel's representation, the other side may perceive "bad-faith" conduct as the reason for impasse. Rather than consider internal conflicts of interest, respondents more readily assume their opponents want to create impasse or act in "bad faith." For example, no respondents identified internal conflicts as a potential cause of impasse. Perhaps respondents maintain an attribution bias that some opponents are all-around bad, unreasonable and untrustworthy.<sup>26</sup>

*1. Conflicts Between Plaintiff and Counsel*

Some responding claims professionals are frustrated by conflicts of interest they perceive between plaintiffs and their lawyers. They believe that most injury lawyers are more interested in generating positive press and maximum contingency fees for themselves, rather than securing resources that will help clients settle and heal. Claims professionals want someone—often the mediator—to help plaintiffs understand this conflict, but they recognize some lawyers prohibit such contact with their clients.<sup>27</sup> At the very least, adjusters and defense counsel want to know that mediators are communicating offers that are based on their legal arguments and case evaluations.

Many responding plaintiffs' lawyers admit they have a problem with client expectations. They confess that they need to discern whether their clients really want a decision or a deal. They also admit that they need to

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26. See also Russell B. Korobkin, *Psychological Impediments to Mediation Success: Theory and Practice*, 21 OHIO ST. J. ON DISP. RESOL. 281, 303 (2006) (explaining attribution bias).

27. See also Krivis *supra* note 2 (reporting a similar trend in his mediation practice where a growing number of attorneys prohibit contact between client and mediator).

thoroughly explain the “best” and “worst” alternatives to trial and keep clients focused on their particular case, not outlier results cited by friends and family. Finally, plaintiffs’ attorneys recognize the need to instill patience in their clients and prepare them for “insulting” offers and impersonal “number-trading” typical of distributive bargaining. Without knowing it, plaintiffs’ counsel and their clients are grappling with a series of emotional reactions to their opponents’ behavior, along with unconscious cognitive challenges concerning decision-making amidst uncertainty.<sup>28</sup>

## 2. *Conflicts Between Carriers, Defense Counsel, and Insured Parties*

Adjusters can be frustrated by the roles that defense counsel want to play in mediation. One risk manager puts it this way, “We may disagree with our own lawyers on value and whether the case should be tried. Our own outside lawyers want to control too much.” Some carriers want defense counsel to focus on the law and litigation only and not worry about settling the case. As one medical malpractice defense lawyer says, “The senior adjuster told me, ‘I know how to settle the case. Tell me how you’re going to defend it.’”

Many carriers do not disclose to their lawyers how much settlement authority they have, revealing some level of distrust within that relationship as well.<sup>29</sup> One senior adjuster said, “I never tell my lawyer my authority. We coordinate and choreograph the way in which we will conduct the mediation [because] it’s important to speak with one voice.”

Defense counsel report frustration when adjusters get too involved in the legal defense of the claim or berate them with questions such as, “What do you think they’ll take? Can they prove their case? What motions can we file?” Perceived professional shortcomings and personalities of adjusters can also be sources of frustration for defense counsel. According to one responding attorney, many adjusters do not have a legal background, do not observe jury trials, are expected to meet or exceed numeric goals, react personally to plaintiffs’ counsel and the mediator, and withhold settlement

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28. Don Philbin, *The Psychology of Bad Economic Decisions*, 7 JAMS DISP. RESOL. ALERT 5 (2007) (summarizing a few common ways in which parties “depart from rational decision making.”). See generally Korobkin, *supra* note 26.

29. See also KISER, *supra* note 1, at 179 (reporting comments from defense counsel that some carriers “do not elicit—and sometimes ignore—counsel’s evaluation and recommendation”).

authority if the mediator is perceived to be too cozy with plaintiffs' counsel.<sup>30</sup>

### *G. Insurance Carrier Protocols*

Insurance carrier protocols frustrate everyone in the mediation. In addition to controlling the administration of the legal defense and the settlement strategy, carriers control the resources that claimants want. Perhaps the chief frustration among respondents is battling with the carrier over a claim's worth. Carriers have various ways of determining settlement values,<sup>31</sup> which, according to one senior adjuster, may include "focus groups and mock trials."

Perhaps some frustration (at least from plaintiffs) stems from a lack of understanding of how insurance companies work. Carriers must set adequate reserve amounts soon after a claim is filed.<sup>32</sup> When claims are not resolved before litigation begins, carriers tend to slow down the resolution process;<sup>33</sup> they are in no hurry to pay money.<sup>34</sup> The longer carriers hold onto their money, the more they make from interest on investments.<sup>35</sup> Another factor that may determine when and how a carrier values a claim is whether a reinsurance contract exists to protect the "ceding," or primary, carrier.<sup>36</sup> If such a contract is in place, the primary carrier's exposure may be a fraction of the plaintiff's best trial outcome,<sup>37</sup> providing it no incentive to bargain beyond a certain range.

Even when the parties are very close to a settlement amount, carriers may not be willing to increase an offer. As one defense attorney reports, "we advise carriers on risk exposure, but senior management sets the value. We write reports all the time and it makes it very hard to come up with more

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30. See also *id.* (describing counsel's negative experience with adjusters who have an "attitude" or "moral outrage").

31. FRANGIAMORE, *supra* note 15, at 2-31, 2-32.

32. *Id.*

33. *Id.* at 1-9.

34. *Id.* at 2-40.

35. *Id.* at 1-3.

36. *Id.* at 4-98.

37. *Id.*

money close to trial.” Even so, plaintiffs’ lawyers expect carriers to offer more money as cases get closer to trial.<sup>38</sup>

If carriers want to settle early, they will do so. Lawyers on both sides report early settlements when demands and offers are “reasonable.” Expenses matter to carriers because litigation produces unknowable outcomes and defense costs.<sup>39</sup> Still, defense costs may be less important than processing the claim the “right” way—even if that means paying a bit more in the end. As reported by one senior claims manager, settlement decisions need to be based on adequate information, following internal protocols.<sup>40</sup> She points out that senior management may not value a “good result” that is obtained the wrong way. She concludes that carriers may prefer to pay more money to resolve a case in the “right” manner, rather than save money in the “wrong” way because “the adjuster might not be so lucky next time.”

## II. WHAT MEDIATORS DO TO ASSIST PARTIES, ATTORNEYS, AND INSURANCE ADJUSTERS

### *A. Advance Preparation by the Mediator*

Many of the mediators interviewed for this project reported that they engage in extensive pre-session preparation by asking questions of counsel, in writing or in person, such as the following:

- What is the tenor of the relationship between counsel and client, insurance adjuster and plaintiff’s counsel, and between the lawyers on both sides?
- Who will attend the mediation and who has authority to resolve the case?
- Stated succinctly, what are the key issues from your perspective and from the other side’s perspective?

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38. See KISER, *supra* note 1, at 188-89 (reporting the reluctance of plaintiffs’ attorneys to accept early settlements and expectation that the “longer you wait, usually the better the deal you’ll get.”).

39. FRANGIAMORE, *supra* note 15, at 1-9.

40. See KISER, *supra* note 1, at 189 (reporting similar responses from lawyers that information and process is important to insurance carriers before settling a litigated claim).

- What are the strengths of their case and the weaknesses in yours? What is the risk of exposure? What is your BATNA (best alternative to a negotiated agreement)?<sup>41</sup> What is their BATNA?
- Have the parties discussed resolution or traded demands and offers?
- Do insurance complications exist?
- Will any party need special or unique settlement terms or special accommodations at the mediation?
- What information does the mediator need to know that does not appear in the mediation statement?

Most mediators realize that pre-session communication with counsel instills trust and confidence and enhances their credibility, as explained in the next section. In fact, responding attorneys confirm greater levels of confidence in mediators who start the process before the mediation session. During pre-session communications, attorneys and parties may express preferences for certain process options, such a joint session with an opening statement in the event that one side does not understand the other side's position. Cases with multiple parties may need a pre-session mediation in order to determine allocation percentages before mediating with the claimants.<sup>42</sup>

### *B. Developing Rapport and Trust*

The mediators interviewed for this article emphasize the importance of relating to people in ways that engender trust. When parties trust the mediator, they are likely to look to and rely on the mediator's feedback to help them make difficult decisions.<sup>43</sup> As one mediator puts it, "Trust-building is the greatest secret ingredient and least analyzed in mediation." Another successful mediator comments, "Trust is crucial to get parties to move. That's why I'll never be shadowed. I need to have intimate, private

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41. ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 99-108 (Bruce Patton ed., 2011) (explaining how one's BATNA prevents the acceptance of terms that are unfavorable and the rejection of those that are favorable).

42. See STEVEN N. TAURKE JOSEPH, AM. BAR ASS'N ADR COMM., *GUIDE TO EFFECTIVE NEGOTIATION STRATEGIES EMPLOYED IN MEDIATION OF LARGE DOLLAR DISPUTES* 99-101 (2011) (advising mediators to determine the expectations of the parties and the explaining the need to conduct a pre-mediation conference in some cases).

43. See Brazil, *supra* note 5, at 201 (explaining how parties often need reassurance and support for difficult decisions).

conversations with counsel where neither one of us is thinking about a third person in the room.” Another mediator reports that in a private discussion, away from the client, he says to counsel, “I can serve you better if you level with me. I won’t betray you. Give me more information about where you want to land. Just stop posturing for a moment. Without a full deck, I can’t get you where you want to be.”

IAM highlighted the critical importance of trust at its 2018 autumn conference. Not only do effective mediators build trust between themselves and participants, they also develop trust between the opposing sides.<sup>44</sup> As brokers of information, mediators have to be trusted by the participants and counsel to perform dual roles that communicate and filter information with credibility.<sup>45</sup> This can be tricky, however, because mediators are not in a good position to assess the trustworthiness or reliability of any of the participants.<sup>46</sup> Given the adversarial nature of mediating litigated cases where information is guarded and bargaining positions can be deceptive, it may be difficult for mediators to discern which facts and figures are truthful and which are not.<sup>47</sup>

Perhaps mediators should regularly revisit the basics of their early training, where they learned how to build trust and rapport with mediation participants. One mediator counsels the importance of focused, active listening regarding “what parties say, not on your responses.” He advises mediators to “maintain a real curiosity in each participant and in each case because it tells the participants that ‘I’m prepared and I want to learn more.’ That matters to the parties especially.” Other ways to establish trust include “being authentic,” “showing respect,” and offering a little humor.<sup>48</sup> Asking “why,” and encouraging parties to “tell me more” and “walk me through it” demonstrate active listening, as does body language.<sup>49</sup>

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44. See Int’l Acad. of Mediators, 2018 Fall Conference in Cleveland, Ohio (Oct. 4-6, 2018) (author’s notes of conference) (on file with the author); see also Brazil, *supra* note 5, at 196 (explaining the importance of trust-development in negotiation).

45. Int’l Acad. of Mediators, *supra* note 44.

46. Brazil, *supra* note 5, at 203-04 (stating mediators cannot know whether representations are truthful or not).

47. Int’l Acad. of Mediators, *supra* note 44.

48. See KISER *supra* note 1, at 212 (reporting comments such as “[e]ffective mediators have a sense of humor” and “they have a demeanor that makes people feel comfortable as soon as possible”).

49. See also Donald T. Saposnek, *Style and the Family Mediator*, in BRINGING PEACE INTO THE ROOM: HOW THE PERSONAL QUALITIES OF THE MEDIATOR IMPACT THE PROCESS OF CONFLICT RESOLUTION 245, 251-52 (Daniel Bowling & David Hoffman eds., 2003); cf. KENNETH CLOKE,

Experienced mediators know it takes time and purposeful planning and execution to establish trust, and it can vanish in an instant—“trust comes by turtle and leaves by jaguar.”<sup>50</sup> One mediator put it this way: “I don’t expect them to bear their souls to me in the beginning. Trust takes time, even if they know me. They hold their cards close.” This mediator reports that he knows he has established trust when he is asked by counsel or a party, “How should we proceed?”

### C. Mediation Coaching

Many responding lawyers like mediators who coach or assist them before or during the mediation process, and many mediators fulfill that role.<sup>51</sup> Assistance and coaching occur in various ways.<sup>52</sup> Some mediators help parties and counsel see themselves and their actions in a larger context by instructing parties to “go to the balcony” and observe the entire situation.<sup>53</sup> Other mediators use visual aids and decision trees as coaching tools.<sup>54</sup> Responding adjusters and lawyers expect mediators to evaluate, or at least interrogate, the legal aspects of the dispute to encourage them move off of their positions where applicable. As one adjuster said, “Don’t expect us to move just because it’s mediation. Give us a reason to move.” Similarly, others adjusters say, “Give me a reason to move that speaks to my risk profile.”

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MEDIATING DANGEROUSLY: THE FRONTIERS OF CONFLICT RESOLUTION 27 (2001) (contrasting active listening techniques that express empathy rather than encourage honesty); Bernard Mayer, *The Future of Mediation: Be Less Certain and More Flexible*, MEDIATE.COM, <https://www.mediate.com/articles/MayerFutures.cfm> [<https://perma.cc/F636-2SBF>].

50. Int’l Acad. of Mediators, *supra* note 44.

51. See TAURKE JOSEPH, *supra* note 42, at 76; Brazil, *supra* note 5, at 176; Korobkin, *supra* note 26, at 282 (suggesting potential interventions for each cognitive bias discussed); Dickstein, *supra* note 8; see also DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR NEUTRALS AND ADVOCATES* 8, 52-58 (Am. Bar. Ass’n 2009).

52. See Brazil, *supra* note 5, at 168 (discussing coaching ideas and related ethical concerns); cf. Thomas J. Stipanowich, *Insights on Mediator Practices and Perceptions*, DISPUTE RES. MAG., Winter 2016, at 4 (presenting research findings that verify flexible and diverse mediation techniques employed by IAM mediators).

53. Teresa F. Frisbie, *Raising Emotional Intelligence at the Mediation Table: A Recipe to Help Parties Tell Their Stories in Self-Distancing Language*, DISP. RESOL. MAG., Winter 2018, at 21.

54. See Brazil, *supra* note 5, at 216; GOLANN, *supra* note 51, at 162-77.

### 1. *Expressing Evaluative Opinions on the Merits of the Case*

Despite the long-running debate over whether mediators should express evaluative opinions,<sup>55</sup> responding litigators in this study prefer strong-willed,<sup>56</sup> evaluative mediators who are not afraid of expressing an opinion about the merits of a claim or defense. One lawyer said about mediators: “We hired you for your insight into a case—give it to us.” Another lawyer urges, “Tell me something about my case I didn’t know before—that’s what I’m paying for.”<sup>57</sup> As summarized by another lawyer, “Mediators who don’t communicate or identify risks to my positions” are not favored.

Some responding lawyers seem to prefer mediators who express evaluative opinions indirectly. For example, a few respondents describe the techniques of a particular mediator who portrays the other side’s legal arguments as “crazy,” much to the glee of counsel in his caucus room. But after he asks a few pointed questions about their case and leaves the room, they report an epiphany and laugh to themselves, “Hey, he’s playing us too!” Says another attorney who works with this mediator, “you know what he’s doing, but he’s just masterful.”

It is important to point out that in the midst of warring opinions about potential outcomes in court, uncertainty abounds.<sup>58</sup> Whether an opinion is “accurate” is typically unknown and may matter less than the way in which mediators manage themselves and the process, and whether the case resolves.<sup>59</sup> Evaluative mediators point out that resolution is less about the law and more about “how a judge or jury responds to competing evidentiary

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55. See Maureen E. Laffin, *Preserving the Integrity of Mediation through the Adoption of Ethical Rules for Lawyer-Mediators*, 14 NOTRE DAME J.L. ETHICS & PUB. POL’Y 479, 481 (2000); Sam Imperati, *Ironically, Bush and Folger are Evaluative*, MEDIATE.COM, <https://www.mediate.com/articles/FuturesImperati.cfm> [<https://perma.cc/V469-TFV6>]; Zena D. Zumeta, *Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation*, MEDIATE.COM, <https://www.mediate.com/articles/zumeta.cfm> [<https://perma.cc/42DY-XZA>].

56. See also KISER, *supra* note 1, at 216.

57. See also TAURKE JOSEPH, *supra* note 42, at 13-15 (quoting lawyers who express similar opinions); Korobkin, *supra* note 26, at 326-27 (discussing varying perspectives on the proper role of a mediator); Stipanowich, *supra* note 52, at 7 (discussing the shift in mediators’ willingness to offer evaluative opinions); James Allen Wall, Timothy C. Dunne & Suzanne Chan-Serafin, *The Effects of Neutral, Evaluative, and Pressing Mediator Strategies*, 29 CONFLICT RESOL. Q. 127, 143 (2011) (reporting empirical support for assertive mediator strategies).

58. Brazil, *supra* note 5, at 203-04.

59. KISER, *supra* note 1 at 216.

presentations.”<sup>60</sup> I agree with Judge Wayne Brazil, who cautions participants not to focus on legal outcomes too much because they obscure settlement opportunities.<sup>61</sup> But one plaintiffs’ lawyer reports a compelling opposing view, based on his years of experience in high-stakes, complex litigation, that the fear of trial or summary judgment most effectively motivate parties to move.

### *2. Mediator’s Role in Analysis of Case Value*

As reported by one IAM member, mediators may assist participants by drawing from their experience settling similar case types, perhaps even with the same set of lawyers. Some mediators, including this author, will recall settlement terms from similar mediations for comparison.<sup>62</sup> When asked about confidentiality, this mediator explains, “I keep confidential the names of the parties and other identifying information, but all of the players, including me, know the values because we’ve settled plenty of these cases together.”

Another coaching technique employed by some mediators is to help parties and counsel discern the meaning behind financial demands and offers.<sup>63</sup> One mediator asks questions of counsel such as, “What are some reasonable assumptions about your number? What are you trying to say? How do you want the other side to interpret your position—accurately or not? Do you want to encourage them that a deal is possible?”

### *3. Streamlining the Bargaining Process*

Mediators can help participants by streamlining the bargaining dynamic to make it a bit more satisfying. Although some attorneys and claims professionals create their own frustrations, responding lawyers want mediators to actively manage the bargaining process.<sup>64</sup> Many attorneys

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60. See also Brazil, *supra* note 5, at 203-04.

61. *Id.* at 179-80.

62. See TAURKE JOSEPH, *supra* note 42, at 70 (quoting another mediator who also negotiates on the basis of similar cases).

63. GOLANN, *supra* note 54, at 52-58.

64. See also *id.* (summarizing the importance of managing concessions by building trust).

complain about how long and arduous bargaining can be.<sup>65</sup> One reason why the process can be so time-consuming is that some lawyers react to their opponents' moves rather than proactively execute their own strategy.<sup>66</sup> Beginning at the first caucus, if not earlier in a pre-session call, mediators can help counsel think about how their moves will affect the responses they may get from the other side.<sup>67</sup>

For example, one mediator asks counsel who start from unreasonable bargaining positions, "Do you want to do it the fast way or the slow way? The slow way is to 'bang heads.' For example, a \$28 million demand in response to a \$400,000 offer is not meaningful if your goal is \$10 million to \$15 million. A faster way is to signal \$15 million to \$20 million." Another mediator encourages the defense to start with a big move; he suggests that they offer seventy percent of their final number with the clear message that only a few small moves remain. He counsels the defense to ignore whether or not the plaintiff reciprocates. In his view, it does not matter. He reminds them to simply stop the process when the adjuster's settlement authority is exhausted. This usually puts plaintiffs' counsel in the position of having a serious client discussion regarding whether or not to accept the "last" offer.

### III. CHALLENGES MEDIATORS ENCOUNTER AND HOW THEY RESPOND

#### *A. Lack of Interest in the Power of the Mediation Process*

A number of mediators report difficult experiences with attorneys who attempt to control them and the mediation process. Examples of attorney control include prohibiting communication between mediator and client, asking for a "mediator's proposal" early and often, and stalling mediation in hopes that the mediator's post-session follow-up efforts might leverage the other side for a lower settlement.<sup>68</sup> Many mediators believe the process increasingly has become lawyer-centric, elevating courtroom-style

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65. See, e.g., Brazil, *supra* note 5, at 204-06 (advising mediators to pace concessions and delay discussing numbers).

66. See J. ANDERSON LITTLE, MAKING MONEY TALK 76 (2007) (describing how "[m]ost negotiators act reflexively" and "develop their next proposal in reaction to the other side's last proposal").

67. *Id.* at 77.

68. See also Krivis, *supra* note 2 (describing similar challenges).

advocacy and obstinacy over managing litigation risk.<sup>69</sup> Some mediators believe that most lawyers do not understand how powerful and beneficial the mediation process can be when it otherwise permits parties to express what really matters to them.<sup>70</sup>

Although some mediators may be unwilling to address these challenges for fear of losing future referrals from litigators,<sup>71</sup> some mediators are willing to do so, encouraging their colleagues to maintain some of the “magic-making” capabilities of mediation in the following ways:

- Training that helps mediators design and manage joint sessions;
- Advise counsel about advocacy opportunities in a well-managed joint session and make clear, in advance, that joint sessions may occur at any time—not necessarily at the beginning of the process;
- Advise counsel to reflect on how joint sessions may help them communicate critical information to the other side—without it becoming an intense, adversarial experience; and
- Encourage judges and bar associations to advocate for and support party involvement in mediations.<sup>72</sup>

### *B. Lack of Preparation by Counsel*

Mediators express frustration over counsel’s lack of preparation for mediation.<sup>73</sup> They report mediations with lawyers who know nothing about their own case, let alone the other side’s case. When lawyers struggle to communicate with each other, mediators report that attorneys expect them to perform that function. Some mediators report that they run the math for

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69. *Id.*

70. Eric Galton & Tracy Allen, *Don’t Torch the Joint Session*, DISP. RESOL. MAG., Fall 2014, at 25, 26. The literature on procedural justice supports this view. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2d ed. 2006); Donna Shestowsky, *Disputants’ Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little*, 23 OHIO ST. J. ON DISP. RESOL. 549, 551 (2008) (discussing the capability of alternative dispute resolution to advance party self-determination by giving them some control over their dispute); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 183 (2004) (explaining the importance of the “opportunity to be heard” and a “reasonable balance between cost and accuracy”).

71. Galton & Allen, *supra* note 70, at 27.

72. *Id.* at 28; Krivis, *supra* note 2.

73. See Krivis, *supra* note 2 (discussing “[t]he failure of litigators to be fully prepared to discuss, not argue, their cases.”). But see John Lande, *Escaping from Lawyers’ Prison of Fear*, 82 UMKC L. REV. 485, 491 (2014) (“Lawyers’ fears can lead them to enhance their performance due to increased preparation and effective ‘thinking on their feet.’”).

parties because some lawyers simply do not analyze their case enough to be helpful; they fail to determine the most important costs, such as amounts due to healthcare providers or insurers.

Mediators can educate counsel on how to prepare for and maximize the potential of the mediation process by encouraging them to exchange information in advance of the mediation.<sup>74</sup> In the opinion of one mediator, this reduces the amount of time lawyers spend arguing over potential trial outcomes early in the process.<sup>75</sup> Whereas trial predictions that occur later in the process are more likely to be perceived realistically. Mediators can engage in early exchanges of information and also prompt parties to have internal discussions before the session, often improving the process on the day of the mediation.<sup>76</sup>

### *C. Overconfidence and Other Heuristics*

Many study respondents understand participants in mediation harbor numerous cognitive biases.<sup>77</sup> Consequently, mediators report the need to assess more than the merits of the case. They observe mannerisms, such as eye contact, for clues as to how people are thinking and feeling. Mediators who help the parties manage biases more successfully help the parties make better decisions.<sup>78</sup> One author recommends the “mediator’s active participation, active insertion of himself in the conflict, and active guidance of the parties toward agreement . . . [to overcome] psychological impediments.”<sup>79</sup> At least one litigator agrees mediators need to “get [their] hands dirty in the case.”

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74. See Dickstein, *supra* note 8.

75. *But see* George Lowenstein et al., *Self-serving assessments of fairness and pretrial bargaining*, 22 J. LEGAL STUD. 135, 159 (1993) (explaining information exchanges only matter to the extent they interact with pre-existing biases).

76. Dickstein, *supra* note 8.

77. This is consistent with previous research. See PAUL BREST & LINDA HAMILTON KRIEGER, *PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT: A GUIDE FOR LAWYERS AND POLICYMAKERS* 267-303 (2010); DAVID A. HOFFMAN ET AL., *MEDIATION: A PRACTICE GUIDE FOR MEDIATORS, LAWYERS, AND OTHER PROFESSIONALS* (2013); PHILBIN, *supra* note 28; Bennett G. Picker & Gregg Relyea, *Cognitive Barriers to Success in Mediation: Irrational Attachments to Positions and Other Errors of Perception That Impact Settlement Decisions*, *MEDIATE.COM* (Jan. 2011), [https://www.mediate.com/articles/PR\\_CognitiveBarriers.cfm](https://www.mediate.com/articles/PR_CognitiveBarriers.cfm) [<https://perma.cc/ZH6P-7EQ5>].

78. HOFFMAN, *supra* note 77, ch. 7.3.3.

79. KOROBKIN, *supra* note 26, at 327.

One of the most common biases in commercial mediation is attorney overconfidence. Mediators report that they deflate overconfidence in various ways. Some techniques are indirect. One mediation firm in Texas has “crystal balls in every conference room.” This is a subtle reminder that future-forecasting can be erroneous, especially in complex cases.<sup>80</sup> Another mediator reports that he has developed a characteristic raised eyebrow, to express sufficient evaluative doubt in counsel’s position and to stymie overconfidence.

Some mediators are more direct in their efforts to diminish overconfidence of clients and claims professionals. For example, some mediators ask counsel, in front of their client, to record their overconfident predictions in writing. This often results in the attorney backpedaling from the initial prediction. On the other hand, other mediators expect lawyers to posture in front of their clients. For that reason, some mediators will engage counsel in private one-on-one conversations away from clients or adjusters to elicit candid disclosures.

Although lawyers want mediators to provide new insights about their legal positions,<sup>81</sup> mediators often oblige but not for the reasons that counsel believe are important (namely, to improve counsel’s legal assessments). Instead, mediators express evaluative opinions to help them manage overconfidence and other heuristics. Some mediators suggest that aggressive evaluation may be the only way to overcome attorney overconfidence.<sup>82</sup> Others, who favor more facilitative or transformative mediation, disagree.<sup>83</sup>

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80. E.g., Dan Gardner & Philip Tetlock, *What’s Wrong with Expert Predictions: Overcoming Our Aversion to Acknowledging Our Ignorance*, CATO UNBOUND (July 11, 2011) <https://www.cato-unbound.org/2011/07/11/dan-gardner-philip-tetlock/overcoming-our-aversion-acknowledging-our-ignorance> [<https://perma.cc/NB59-CFK4>].

81. See *supra* notes 55-57 and accompanying text.

82. KOROBKIN, *supra* note 26, at 298 (“Far from being an elective approach, direct evaluation is often necessary to overcome the overconfidence bias[.]”).

83. See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* 1 (2005); Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937 (1997); Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1, 9 (2003); Zena Zumeta, *Facilitative Mediator Responds, A*, 2000 J. DISP. RESOL. 335, 337.

*1. Expressing Evaluative Opinions to Manage Heuristics*

Evaluative opinions are expressed in various ways and at various times in order to manage heuristics. Mediators distinguish their message depending on the audience, advising, “When persuading the defense, talk about the evidence, who will testify, and the documents; for plaintiffs, talk about the risks.” The content of these opinions is less important than how they are expressed. Mediators report that they attempt to express evaluative opinions in a clear and deferential manner. One mediator advises, “Never be the bull in a china shop with valuation.” But he also acknowledges that “sometimes parties need to be hit upside the head—just wrap the two-by-four in a lot of velvet.”

Some mediators believe that debating the issues with counsel in caucus, in front of the client, is effective. “It usually gets the client listening.” It may get counsel to listen too. Overconfidence may be overcome with difficult thinking prompted by the mediator, pushing parties to think harder and more deliberately about their assumptions.<sup>84</sup> When information about a decision is difficult to process, intuition gives way to deliberation.<sup>85</sup>

Rather than argue with counsel, some mediators ask questions such as, “What’s concerning you about the case? How could it go wrong? What is your risk of exposure?” They understand that “clients listen and respond to that” as well. Other mediators express opinions to counsel and in front of parties about litigation vulnerabilities, warning them, “I don’t want this to happen to you.” As one mediator puts it, openly expressing her concerns about the case prompts parties to say to themselves, “She’s concerned about me.” Remember, cautions another mediator, “[w]hat the dispute looks like to the attorneys is different from what it looks like to the parties.”

For some mediators, evaluative opinions must be expressed at the right time. They will wait patiently for the right moment to express those opinions. “I’ll inform one side of the risks in order for them to re-evaluate their positions. It takes lots of trust. They know I’m engaged and interested. They want me to help. I’m patient for that to happen.”

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84. BREST & KRIEGER, *supra* note 77, at 293; see also Robert D. Benjamin, *Managing the Natural Energy of Conflict: Mediators, Tricksters, and the Constructive Use of Deception*, in BRINGING PEACE INTO THE ROOM: HOW THE PERSONAL QUALITIES OF THE MEDIATOR IMPACT THE PROCESS OF CONFLICT RESOLUTION 109, 113-14 (Daniel Bowling & David Hoffman eds., 2003) (explaining the importance of leveraging “dissonance in thinking” so that parties can consider other views).

85. BREST & KRIEGER, *supra* note 77, at 293.

Rather than earn the parties' trust before expressing an opinion, one mediator sees it the other way around: trust comes as a byproduct of evaluation. He builds trust and confidence *because* he expresses evaluative opinions. But he cautions, "How hard you push depends on attorney and client. Be careful with plaintiffs in cases that will be decided by juries. Acknowledge good points but ask, 'What if it doesn't happen?' Remind them that other evidence goes against it." Some mediators emphasize the perils of jury decisions by explaining to parties, "Juries decide based on who they like. Do you usually trust people you've never met before?" Some mediators say, "I'm being honest with you. I could be on your jury."

#### *D. Lack of Negotiation Strategy*

Mediators report that too many lawyers fail to develop or adhere to a negotiation plan during the mediation.<sup>86</sup> These mediators observe strategies that are limited to reacting to the other side's bargaining moves and trial outcome predictions. To address this problem, one mediator tries to avoid that dynamic in his joint sessions where counsel is likely to say something like, "We're going to crush you like a bug. Now let's make a deal." Instead, this mediator will query counsel:

Why start with that? We're wasting time. You're asking them to respond to your worst points and a position you don't really maintain. You will accept some percentage of their demand or will pay some number north of your offer.

It antagonizes them and makes it harder to get a deal.

Some mediators coach counsel by suggesting bargaining moves throughout the process.<sup>87</sup> Other mediators predict how the bargaining will likely unfold based on prior experiences with the lawyers or the case type.<sup>88</sup> Similarly, insurance claims professionals likely prepare their own bargaining strategies in advance of the mediation, anticipating how much each side will move throughout the process. One defense attorney describes

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86. See also LITTLE, *supra* note 66, at 77 ("The crux of the problem is that most negotiators never get past case analysis to develop any plan for movement during the negotiation."); Dickstein, *supra* note 8 (listing a number of "bad habits" that many lawyers mistake for strategy including the failure to understand the "first offer is a message").

87. See also LITTLE *supra* note 66, at 111-120; GOLANN *supra* note 54, at 52-62.

88. See, e.g., LITTLE *supra* note 66, at 239-61 (charting bargaining rounds in court-ordered mediations in North Carolina).

the habits of a particular adjuster who routinely develops bargaining plans for each mediation, ignoring the reactions and threats of plaintiff's counsel. According to this lawyer, the adjuster obtains terrific results, case after case.<sup>89</sup>

According to one mediator, a sense of timing—when to convey information, when to recommend moves, or when to convene certain conversations, etc.—may be the most difficult thing to teach mediators, yet is critical to a successful mediation. He adds, “closing is a timing issue.” Some mediators report that they routinely manipulate the timing of moves in order to avoid early impasse that would otherwise be virtually assured.<sup>90</sup> “The right move at the wrong time can kill progress,” as one mediator puts it. Mediators who seem to possess a keen sense of timing advise that “awareness is key. Your idea may be a good one. But is it good right now?”

#### *E. Control of the Mediation*

Some participants intend to control or “game” the mediation process.<sup>91</sup> Although a number of mediators report that fewer cases are settling on the day of mediation, closure may be better timed after the mediation. As one mediator says, “People in significant cases need time to think about what happened in mediation before they’re ready to make the next move. For example, future surgery may need to be considered before more authority is granted.” Perhaps parties need time to consider their options from a practical perspective, or they may need time to construct a “hero story.”<sup>92</sup> In other

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89. See also TAURKE JOSEPH, *supra* note 42, at 69 (describing the benefits of developing a pre-planned bargaining strategy in mediation).

90. See also Benjamin, *supra* note 84, at 122 (explaining how mediators need time to “set the scene and prepare the participants so that the resolution . . . appears to be of their own design”).

91. A thorough discussion about the ethics of lying in settlement negotiations is outside the scope of this article. Nonetheless, some authors acknowledge that lying “works” in some mediation circumstances. See Gerald Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219, 1272 (1990) (“[W]e might admit that, in a wide range of circumstances, lying works.”); Robert Benjamin, *Cloaked Negotiation: Necessary Back-Channel, Under the Table and Surreptitious Strategies and Techniques to Make Deals Work*, MEDIATE.COM (Jan. 9, 2009), <https://www.mediate.com/articles/benjamin43.cfm> [<https://perma.cc/PH49-53PT>] (explaining the utility of “cloaked negotiation strategies” to counteract “the loss of face” and reactive devaluation); John Cooley, *Defining the Ethical Limits of Acceptable Deception in Mediation*, MEDIATE.COM (Dec. 2000), <https://www.mediate.com/articles/cooley1.cfm> [<https://perma.cc/XR2Y-LTMB>] (“[W]hatever truthfulness standard is adopted, it must accommodate, or at least acknowledge, the concept of the ‘noble lie.’”).

92. A term this author heard used for the first time by a mediator who practices in Texas.

words, parties need to get the approval of others—professionally or psychologically—in order to save face with others and themselves.<sup>93</sup>

#### *F. Not Responding to Frustrations and Challenges*

Some senior mediators have reached a point in their careers that they do not care what lawyers think of them. Ironically, perhaps for that reason, these mediators continue to get plenty of referrals because they are not afraid of holding back “the truth” as they see it. One of these mediators remarked, “I don’t have patience for those who ignore the obvious. Those who don’t want to talk about facts don’t use me.” This view aligns with other advice given by mediators “to be bold” and “don’t worry if the lawyers will call you back.”

### IV. HOW MEDIATORS FRUSTRATE ATTORNEYS AND ADJUSTERS

#### *A. What Counsel and Claims Professionals Expect From Mediators*

One way to understand how mediators frustrate attorneys and adjusters is to appreciate how they do not. Although there may be a wide variety of opinions regarding how attorneys think mediators should conduct the process, attorneys report good mediators are “trusted,” “listen well,”<sup>94</sup> possess “great people skills,” and “get results.”<sup>95</sup>

No doubt, all mediators are not equal. In the opinion of many attorneys, there are wide disparities among mediators in terms of their ability to deliver the kinds of services sought by many lawyers and claims professionals.<sup>96</sup> Lawyers and adjusters are frustrated by mediators they perceive to be weak,

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93. See Ellen Kandell, *Methods of Saving Face in Conflict*, ALT. RESOLS., LLC. (Dec. 5, 2018) <https://www.alternativeresolutions.net/2018/12/05/methods-of-saving-face-in-conflict/> [<https://perma.cc/U95E-3H2J>]; Greg Stone, *Preparing for Mediation: A Practical Guide to Saving Face*, MEDIATE.COM (Apr. 2013), <https://www.mediate.com/articles/StoneG2.cfm> [<https://perma.cc/P3JK-HFYP>].

94. See KISER, *supra* note 1, at 211-12 (reporting similar results).

95. See FRANGIAMORE, *supra* note 15, at 7-15 (affirming the ability of “good” mediators to distill the case down to a few significant points).

96. See *id.* at 7A-3; Roselle L. Wissler, *Barriers to Attorneys’ Discussion and Use of ADR*, 19 OHIO ST. J. ON DISP. RESOL. 459, 485 (2004) (finding more than a third of attorneys in a study believed the supply of “qualified ADR neutrals was insufficient”).

take too much time caucusing with their opponents, unable to convey their message, or simply fail to generate movement.

### *B. Failure to Connect with Participants*

Many lawyers report frustration with mediators who have little to no ability to connect with parties and express empathy, or who appear detached, uncaring, or disengaged. Lawyers and claims professionals know how important it is for parties (injured parties in particular) to feel connected to an empathetic mediator.<sup>97</sup> Defense lawyers and adjusters want the mediator to develop a trusting relationship with plaintiffs.

Unfortunately, this enthusiasm may not be altruistic. In competitive bargaining dynamics, participants could use anything to gain leverage—which includes building rapport and trust between a mediator and a party. It is conceivable that the mediator’s ability (or perceived inability) to connect with a party may not be at issue; instead the mediator may be protecting a party from manipulation or exploitation. Plaintiffs’ counsel may try to preclude mediator-client contact for this reason.<sup>98</sup>

### *C. Misapplying Facilitative and Transformative Techniques*

Many litigators in the study express a disdain for facilitative or transformative techniques,<sup>99</sup> a view that may be more prevalent in commercial litigation.<sup>100</sup> One such lawyer complained, “Don’t try to make us get along in injury cases. That’s the wrong way.” In the opinion of many

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97. See also FRANGIAMORE, *supra* note 15, at 7-4 (discussing empathy as a “valuable negotiation tool”); A. IRVIN SCHEIN, MINDEN GROSS LLP, THE ROLE OF ANGER IN MEDIATION 13 (2013), <https://mindengross.com/docs/default-source/publications/the-role-of-anger-in-mediation> [<https://perma.cc/Z8Z5-X85Q>] (identifying empathy as a “tool employed by successful mediators”).

98. See *supra* note 27 and accompanying text.

99. See Zumeta, *supra* note 55 (summarizing facilitative mediators as those who do not recommend settlement terms or predict legal outcomes and transformative mediators empower parties to recognize each other’s “needs, interests, values, and points of view.”); Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 17 (1996) (describing a continuum of mediation styles or practice orientations that “facilitate” the parties’ negotiation and evaluate “matters that are important to the mediation”).

100. See Julie MacFarlane, *Culture Change—A Tale of Two Cities and Mandatory Court-Connected Mediation*, 2002 J. Disp. Resol. 241, 244-45; see also Burns, *supra* note 7, at 706-16 (discussing why transformative mediation is incompatible with client autonomy and the role of a litigator).

litigators interviewed for this project, facilitation and transformative techniques are not perceived to be “strong” enough to move parties off of their positions. Most lawyers interviewed for this project prefer separate caucuses, akin to settlement conferences, with short, meet-and greet style joint sessions. Expressing this view, one lawyer reiterated, “Don’t make us go through an adversarial joint session. My client and I will dig in.”

But, successful mediators must possess a diverse set of skills that will help parties achieve their outcome goals.<sup>101</sup> Flexibility and adaptability are critical in this regard.<sup>102</sup> As stated by one author, “a mediator who limits his involvement to pure facilitation reduces the number of tools at his disposal that can help the disputants to identify and agree on a set of settlement terms[.]”<sup>103</sup> Similarly, the mediator who only uses evaluative techniques works with limited tools.

#### *D. Lack of Fortitude and Creativity*

As mentioned earlier, responding lawyers in the study express frustration about mediators who appear “weak,” unable to generate movement, or are indifferent to closing the case.<sup>104</sup> Respondents express a desire for mediators who are both creative problem-solvers and who are in control—especially when it comes to badly-behaved participants and “bully” attorneys.<sup>105</sup> Other comments from respondents include the following: “Don’t be a paper airplane who simply shuffles numbers back and forth.” “Don’t stick to the same process over and over again.”<sup>106</sup>

#### *E. Evaluative Opinions*

Respondents report that evaluative opinions of mediators can frustrate counsel who believe strongly in their case and know their strengths and

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101. John Bickerman, *Giving Mediation Clients What They Want*, NAT’L L. J. (Nov. 14, 2009, 12:00 AM), <https://www.law.com/nationallawjournal/almID/1202435438370/giving-mediation-clients-what-they-want/> [https://perma.cc/NAG6-DS2R].

102. *Id.*

103. Korobkin, *supra* note 26, at 327.

104. *See supra* Section IV.A.

105. *See also* TAURKE JOSEPH, *supra* note 42, at 113 (reporting similar results).

106. *See also* Stipanowich, *supra* note 52, at 6 (describing diverse and flexible practice techniques of IAM members).

weaknesses.<sup>107</sup> It is easy to counter-argue or simply reject the mediator's evaluation since there is wide discretion regarding the admission and weight of evidence and interpretation of law.<sup>108</sup> Most lawyers and claims professionals report that they do not like evaluative opinions that bully their side into concessions. "Don't tell me how doom-and-gloom my position is all the time." Counsel and claims professionals want mediators to evaluate the other side's case with equal force and skepticism. Some claims professionals grow frustrated and may perceive mediator bias when it appears that the discussion is consistently "pro-plaintiff."

#### *F. Mismanagement of Information*

Responding adjusters and lawyers also express frustration with mediators who withhold information or keep participants "in the dark" during the mediation process, especially if other parties settle out of the case. They request, "Don't deny me information during the process. Tell me what's happening in the other rooms. Check in with me at least every now and again." Without feedback, one senior adjuster wonders, "Is my message getting through to the other side?"

#### *G. Premature Termination of the Process*

Lawyers participating in this study do not want to work with mediators who give up too soon. Some mediators report the need to be "dogged" and "tenacious" in resolving disputes. But others with decades of experience are not as steadfast, claiming, "You can't want a settlement more than the parties do." Although attorneys say that they want mediators to work very hard to settle the case, they also do not want their time wasted. This creates some tension for mediators to continue working despite strong signs of impasse. When should they stop? How do they know when the impasse cannot be broken? No one really knows how long the mediator should persevere. The only person who has sufficient information to decide when to quit is the mediator. The perception of wasted time can make the mediator

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107. KISER, *supra* note 1, at 173-74.

108. *But see id.* (discussing attorneys who put greater weight on the evaluative opinions of judges in settlement conferences).

look bad. “Any ineffective use of my time is bad,” said one construction adjuster. Attorneys surveyed have said the same.

#### *H. Failure to Coordinate Logistics*

One risk manager made clear her need to have adequate time and space to get into the right frame of mind for the mediation. She counsels mediators to “think through and organize the logistics. Make it easy for me to know where I go, where to put my coat, allow me time to use the restroom and get a cup of coffee, tell me what time lunch will be served, etc.”<sup>109</sup> This is not to say that claims professionals deserve special treatment—even though they have the resources that can resolve disputes. Each participant has an important role to play. Mediators should think about how each participant will transition from their travels to the mediation and forget about other concerns so they can focus on the case at hand.

#### CONCLUSION

Unfortunately, the typical mediation of a litigated commercial dispute is often limited to an aggressive battle over whose trial prediction is more credible than the other’s. Many lawyers seem to be unaware of other methods of persuasion and influence, and fail to realize that posturing over possible trial outcomes is not as persuasive as a proposal that makes litigation look too risky for their opponent. Parties usually respond favorably to reasonable settlement proposals because they permit each party to reflect on their risk tolerance and put a quantifiable value to time and cost savings, whereas litigation outcome predictions do not.<sup>110</sup> Moreover, claimants and defendants are attracted to the certainty that comes with settlement.<sup>111</sup>

To the extent that mediators are frustrated by these developments, let this “study in contrasts” serve as a recipe that can reconstitute mediation’s “secret sauce.” As common as it is for lawyers in mediation to focus on trial-

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109. See also Grant Hill, *Don’t Make Major Decisions on an Empty Stomach*, SCIENCE DAILY (Sept. 16, 2019), <https://www.sciencedaily.com/releases/2019/09/190916103811.htm> [<https://perma.cc/H2Z9-7A47>].

110. See TAURKE JOSEPH, *supra* note 42, at 77.

111. KISER, *supra* note 1, at 187 (“[S]ettlement value reflects the certainty of getting the case resolved.”).

like advocacy, posture over legal outcomes, and “game” the process, so too should it be common for mediators to move participants toward a more sophisticated view of conflict and resolution.<sup>112</sup> “There is no cookbook formula”<sup>113</sup> that can integrate or transform the polarities of the parties’ positions.<sup>114</sup> If nothing else, mediators can return to simple, direct techniques that expand a party’s understanding of the situation, highlight underlying interests, and illuminate potential options.<sup>115</sup> The work is difficult, but the effort is essential.<sup>116</sup>

Although respondents express numerous complaints about each other, few recommend changes to the mediation process itself, or a reduction or elimination of its use. The general consensus is that when compared to litigation and adjudication, mediation’s potential for delivering efficient and satisfying outcomes cannot yet be beat. Recall, however, this was also the promise of arbitration.<sup>117</sup> As lawyers exerted more influence over the arbitration process, it too devolved into something more akin to courtroom litigation, but with fewer rights of appeal.<sup>118</sup> Although lawyers like to mediate, they are likely to continue hiring mediators who can function within a legal paradigm. On the one hand, the future looks bright—lawyers need mediators and parties need mediation. On the other hand, the challenge for mediators is to resist watering down the “secret sauce” in order to cook up a successful practice.

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112. MAYER, *supra* note 3, at 17.

113. *See supra* notes 101-03, 106, and accompanying text.

114. MAYER, *supra* note 3, at 17, 271 (quoting KENNETH CLOKE, *THE DANCE OF OPPOSITES: EXPLORATIONS IN MEDIATION, DIALOGUE AND CONFLICT RESOLUTION SYSTEMS DESIGN* 355 (2013)) (observing that “dialectics” can transform “polarity into unity”).

115. MAYER, *supra* note 3, at 43-44.

116. *Id.* at 271-72.

117. Thomas J. Stipanowich, *Arbitration: The “New Litigation,”* 2010 U. ILL. L. REV. 1, 22.

118. *Id.*; Sylvia Hsieh, *Arbitration Falling Out of Vogue*, INT’L INST. FOR CONFLICT PREVENTION & RESOL. (Mar. 10, 2008), <https://www.cpradr.org/news-publications/articles/2008-03-10-arbitration-falling-out-of-vogue-lawyers-usa> [<https://perma.cc/JRM5-XUZC>].

## APPENDIX A: QUESTIONS ASKED OF PARTICIPANTS IN THE STUDY

*Questions Asked of Attorneys*

1. Deciding whether mediation is a good choice for a particular case
  - a. What are the most important factors in case evaluation?
  - b. How do you assess the risks of a litigated outcome?
2. What do you consider when determining whether a particular mediator is a good fit for a particular case?
  - a. Do different types of cases suggest different types of mediators?
  - c. What makes a good or bad mediator?
  - d. How do you negotiate with opposing counsel regarding mediator choice (i.e., when do you defer, when do you push)?
  - e. Do insurance companies play a large role in selecting the mediator?
  - f. Do mediators contact you before the session? If so, what do they do?
  - g. What are some examples of effective techniques you've seen mediators employ?
3. What kinds of concerns do clients have regarding mediation?
4. When is the right time to mediate? How much information do you need? Are there exceptions (i.e., when is early mediation worthwhile)?
5. What are your common challenges and frustrations?
  - a. How do you respond?
  - b. How do you manage your client's reactions to their frustrations?
  - c. How do you wish your opponents responded to your frustrations?
  - d. How do you interpret overly inflated demands and lowball offers in mediation?
6. How do you persuade others in mediation? How have you been persuaded?
7. What do you value most in mediation (e.g., process, outcome)?
8. What would you change about mediation if you could?

9. Do you allow your client to speak to the mediator? Why or why not?
10. Do you believe there is a tension between the roles of zealous advocate and counselor who manages risk? If so, please comment as to how you manage this tension when negotiating or mediating.
11. Defense attorneys: How do carriers settle cases? What do you wish they would do differently and why?

*Questions Asked of Mediators*

1. What are common challenges you face in mediation and how do you manage these?
2. What challenges do you believe participants face?
3. How do you get participants to move off of these challenges?
  - a. What are your most effective techniques?
  - b. When do you pursue these techniques (e.g., early, middle, late, post-session)?
  - c. Why might you not be successful in this regard?
4. How do you build trust and confidence with the parties?
  - a. How much time do you take?
  - b. How do you work with difficult personalities?
5. How do you stage and manage difficult conversations?
6. What are the most challenging circumstances you encounter in your mediation practice (i.e., your most difficult moments of persuading one side or another)? How do you respond?
7. What advice would you offer attorneys, parties, and carriers in mediation?
8. In what ways do you believe you are different than other mediators?

9. What causes most non-settlements?
10. What have you learned that you think is important to pass on to other aspiring mediators?

*Questions Asked of Claims Professionals*

1. What are common or unique challenges you face in mediation?
  - a. How do you respond to these challenges?
2. How do you handle the differences in case evaluation you may have compared to evaluations made by your superiors or outside counsel?
3. Are you concerned that you may become overconfident in your own position?
  - a. If so, what do you do about it?
  - b. Have you overpaid a claim because you were overconfident of the legal outcome?
4. How do you use data to determine case value?
  - a. Do you use comparative data on a regular basis?
  - b. How do you assess elements of a case that differ from those in the data set?
5. How do you determine whether a case is a good candidate for mediation?
  - a. When is the right time?
6. How do you believe you are most persuasive to the other side and the mediator?
  - a. How do you get the other side to move?
7. Do you structure post-session talks if the case does not settle?
  - a. If so, how?
  - b. Should the mediator?
  - c. If so, how?

8. What makes for good or bad mediation?
  - a. Is the outcome (i.e., the resolution) more important than the process (i.e., the manner in which the mediation is conducted)?
  - b. Do you prefer mediators who will “bang heads” to settle, mediators who possess interpersonal skills, or mediators who employ a blended process?
  - c. Should the mediator possess subject-matter expertise? Or does this not matter as long as the other side is moving off of their position?
  - d. Is status important (i.e., do you prefer retired-judge mediators)?

