THE FUTURE OF MEDIATION IN INDIA

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ABSTRACT

Problems with India's Judicial System might be similar to U.S. – Decline in Courtroom Trials in U.S. – Mediation Winning Out in Marketplace – Mediation is by Contract – Advantages of ADR – Qualities of Successful Mediator. This article discusses problems with the U.S. trial system and why mediation became a necessity. It also covers reasons why the American mediation model became so successful and is winning out in the marketplace over the courtroom trial. Mediation is successful because (1) it is by contract, (2) mediators are trained to be peacemakers, (3) mediators are trained to be patient, positive and persistent, (4) mediators are trained to identify the real needs of the parties, (5) the mediator is supportive of

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counsel, (6) caucus mediation is ideal to handle complex cases, and (7) mediation can accommodate more than a dollar resolution. The article also contends that India's rich history makes it a perfect candidate for extensive application of mediation to resolve long pending disputes. Finally, it discusses where proponents of mediation might find resistance and how this can be overcome.

I. INTRODUCTION

India's legal system has reached the point where a push to mediation could reap huge benefits. The problems the Indian legal system faces are not unique; they are similar to those faced by the courts in America. Former Chief Justice Warren E. Burger of the United States Supreme Court summarized the problems faced by the American legal system in 1984, in these words: *"The American legal system is too costly, too lengthy, too destructive, and too inefficient for a civilized people."*[1] He criticized American lawyers because they pushed costs of litigation so high only the rich and those insured could utilize the courts.[2] He criticized judges because they permitted

[1]Warren E. Burger, Mid-Year Meeting of the American Bar Association, 52 U.S.L.W. 2461, 2471 (1984).

[2]All recognize that one of the fundamental defects in the American judicial system is the soaring costs of litigation. Lawyer's fees in many instances exceed $1000 (RS 50,000) per hour and costs of litigation are in the hundreds of thousands and even millions of dollars. In one case $40 million was spent in pretrial discovery, and in another $80 million. See, Richard M. Calkins, *The ADR Revolution*, 6 RUTGERS CONFL. RESOL. L. JOURNAL (2008). In one major antitrust class action, which had gone to trial, the defendant was spending $5 million per week supporting 20 lawyers and 30 support staff attending the trial.

One federal judge (U.S. District Judge John A. Jarvey, Southern District of Iowa) lamented that he could not afford to utilize the legal system he cherished. He added that although *"we have created the fairest system in the world for resolving civil*

cases to languish in the courts for five, ten, and even twenty years.[3] He expressed grave concern with the inefficiencies of the system because it left many venues overburdened and facing gridlock.[4]

Chief Justice Burger's answer to what was becoming a crisis was mediation. He charged the American bar to explore mediation, to provide *"mechanisms that can provide an acceptable result in the shortest possible time, with the least possible expense, and with minimum stress on the participants. That is what justice is all about."*[5]

Chief Justice Burger urged the profession, for the most part, to remove civil cases from the courtroom to the conference table. But he admonished lawyers to do much more. He directed them to shed their coats of advocacy and done the cloaks of peacemakers and healers of human conflict. He urged:

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disputes, it is so expensive that very few in America can afford to use it. The court system serves the rich, those with insurance, and those who can shift the costs of litigation to the rich and those with insurance."

[3]In the *Midwest Milk Monopolization case*, the case languished in the courts for 20 years, with another three years anticipated before it could be resolved, when the parties settled through mediation. See, In re Midwest Milk Monopolization Litig., 510 F.Supp. 381 (1981), *aff'dinpart*, *revs'd in part*, 687 F.2d 1173 (8th Cir. 1982); *on remand*, Alexander v. Nat'l Farmers Org., Inc., 614 F.Supp. 745 (W.D. Mo. 1985); *aff'd in part, rev'd in part sum nom,* Nat'l Farmers Org. Inc. v. Associated Milk Producers, Inc. 850 F.2d 1286 (8th Cir. 1988), *amended by* 878 F.2d 1118 (8th Cir. 1989).

In his valedictory speech to students participating in the First Annual National Indian Mediation Tournament, Justice A.K. Patnaik of the Indian Supreme Court, stated that, *"Justice delayed is justice denied."*

[4]The causes for the increase in cases filed are several: first, there was an increase in statutory and regulatory promulgations opening the courts to new claims and causes of action. Chief Justice Burger stated:

One reason our courts have been overburdened is that Americans are increasingly turning to the courts for relief from a range of personal distresses and anxieties. Remedies for personal wrongs that once were considered the responsibility of institutions other than the courts are now boldly asserted as legal 'entitlements.' The courts have been expected to fill the void created by the decline of church, family, and neighborhood unity.

Warren E. Burger, *Isn't There A Better Way?* 68 A.B.A.J. 274, 275 (1982).

[5]*Id.*

[Lawyers] must be legal architects, engineers, builders, and from time to time, inventors as well. We have served, and must continue to see our role, as problem-solvers, harmonizers, peacemakers, the healers – not the promoters – of conflict.[6]

The American legal profession responded favorably and mediation became a way of life. It quickly became the primary mechanism for resolving disputes so much so that it pushed the courtroom trial into the category of last resort. Indeed, mediation took America by storm. As one federal magistrate stated: *"Civil trials in the federal courts in Iowa are disappearing. That is a statistical fact. Most cases that were previously tried are now settled, mainly with the aid of mediation."*[7]

The impact of mediation has been dramatic and severe. In spite of the increased number of lawyers and cases filed over the past thirty years, both the percentage and absolute number of civil trials have dramatically decreased. The portion of federal civil cases resolved by trial fell from 11.5 percent in 1962 to 1.8 percent in 2007.[8] More

[6]Warren E. Burger, *The Role of the Law School in Teaching Legal Ethics and Professional Responsibility*, 29 CLEV. ST. L. REV. 377, 378 (1980). Chief Justice Burger also stated: *"The obligation of your profession is to serve as healers of human conflicts."*

[7]Federal Magistrate Paul A. Zoss, Northern District of Iowa. A federal judge stated: *Mediation took Iowa by storm for several reasons. First, while courts were loath to sponsor settlement conferences until the eve of trial, mediation is now conducted earlier and often prior to filing. Second, the process typically takes four to six hours and facilitates more rapid exchange of proposals. Third, people are naturally attracted to a process that gives them more control over the outcome of the dispute. Finally, compared to the jury trial, mediation is exceedingly inexpensive.*
Federal Judge John A. Jarvey, Northern District of Iowa.

[8]Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 462-63 (2004).

startling is the 60 percent decline in absolute number of cases tried just since the mid-1980s.[9]

The bottom line is that there was a drastic need for change in America, which was born of necessity. The high costs, length of time to resolution and inefficiencies in the system itself dictated this change.[10]

Once mediation was introduced in America and the public saw its advantages, it won out in the marketplace. As one federal judge stated: *"There is now a dispute resolution marketplace and mediation seems to be prevailing in that market."*[11] When parties have a choice whether to go to trial and face the uncertainties of the result, bear substantial costs, face the prospects of protracted proceedings, they will choose mediation. It is inexpensive, it is expeditious and can resolve a matter in a day rather than months or years, and it is kinder on the parties participating.

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[9]*Id.* at 462-63. Professor Galanter stated: *"The phenomenon is not confined to federal courts; there are comparable declines of trials, both civil and criminal, in state courts, where the majority of trials occur." Id.* at 460.
In 1938, close to one in five cases were terminated by trial. Now it is close to one in one hundred, and in twenty years will be one in two hundred. Peter L. Murray, *The Privatization of Civil Justice*, 91 JUDICATURE 272 (2008).

[10]Initially, the courts and lawyers saw mediation as a nice way to resolve claims in small claims court or neighborhood disputes; JENNIFER E. BEER, PEACEMAKING IN YOUR NEIGHBORHOOD: REFLECTIONS ON AN EXPERIMENT IN COMMUNITY MEDIATION 3-4 (1986). Raymond Skenholtz, *Neighborhood Justice Systems: Work, Structure, and Guiding Principles*, 5 MEDIATION Q. 3 (1984) (advocating new justice systems focused on addressing conflicts at family, school, and neighborhood levels before they require action by the state). Today, however, mediation has found success even in the most complex of cases. In fact, there is no area of law that mediation has not touched from the simple to complex. Mediation is as effective in the multiparty complex class action as the small personal injury tort.
The author has mediated over 2000 cases, including eight major antitrust cases, as well as copyright, trademark, construction, contract, personal injury, sexual abuse, medical and legal malpractice, wrongful death, etc.

[11]Federal Judge John A. Jarvey, Northern District of Iowa.

There is another important reason mediation is winning out in the market. It places in the hands of the parties control over their case. They alone decide whether to settle and on what terms or return to the courts. They are no longer at the mercy of a judge or even their own attorneys, making life decisions for them. In mediation, the parties are empowered unless they voluntarily relinquish it.

Finally, another reason mediation has flourished in America is because it is accommodating and user friendly. The courtroom trial with its adversarial underpinnings is stressful and often destructive to those who participate. Even trial lawyers are impacted.[12] For parties subject to cross-examination and impeachment by skilled lawyers, the process is at least demeaning. Indeed, Judge Learned Hand, a very famous American jurist, observed, *"I would say as a litigant, I should dread a lawsuit beyond almost anything short of sickness and of death."*[13] A trained mediator, on the other hand, will seek to establish rapport and trust with the parties, will show interest and compassion, and will seek a resolution which will lift the burden of litigation from parties' shoulders. The mediator will seek not only resolution but conciliation, peace and even healing.[14]

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[12]Chief Justice Burger observed: *"The entire legal profession, lawyers, judges, and law professors has become so mesmerized with the stimulation of the courtroom contest that we tend to forget that we ought to be healers of conflict."* WARREN E. BURGER, ANNUAL REPORT OF THE STATE OF THE JUDICIARY (1984).

[13]Learned Hand, *The Deficiencies of Trial to Reach the Heart of the Matter*, LECTURES ON LEGAL TOPICS 89, 105 (1926).

United States Supreme Court Associate Justice Antonin Scalia noted that, *"I think we are too ready today to seek vindication or vengeance through adversary proceedings rather than peace through mediation.",* Antonin Scalia, *Teaching About the Law*, CHRISTIAN LEGAL SOC'Y Q. 6, 8 (1987).

The author has witnessed two fatal heart attacks and one suicide directly related to trial. The stress of trial can affect both the mental and physical well-being of those participating.

[14]*Case Study:* Thirteen high school and college students were traveling in a van in northern Wisconsin. They were selling magazines door to door in various towns. Traveling 84 mph, the van was spotted by a police cruiser. A 16-year old was driving the van and did not have a driver's license. He tried to switch with the girl next to him and the van crashed. Seven students were killed, one ended up with a

This article discusses (1) how the American model might be replicated in India, (2) the impact mediation can have on the Indian legal system, and (3) try to answer those who are resistant to change.

II. THE AMERICAN MODEL

A. Historical Perspective of Non Adversarial Resolution

Historically, India is a much more fertile ground for mediation than the United States. It has rich ties to ancient mediation, which began over 2000 years ago in China, going back to the time of Confucius. *"Islamic, Hindu, Buddhist, Confucian, and many indigenous cultures have extensive and effective traditions of mediation practices."*[15] Eastern Asian thought viewed mediation as superior to recourse to an adversarial system of law.[16] Litigation was considered *"a shameful*

serious closed head injury, and one a quadriplegic. Suit was filed against the owner of the magazine company that had hired the students. The matter was mediated and a settlement worked out. However, all parents representing the students had to agree to the settlement. One father who lost a daughter and mother who lost a son refused to sign. It was not the money but a desire to punish the owner of the company. A second mediation was conducted and the two parents finally agreed to the settlement. The mediator then asked if the two would like to speak to the owner, whom they had not seen up to that point. The mother said she would. The two met and the mother told the owner how evil she was to allow such a tragedy. After ten minutes, she stopped. The owner then said she would feel the same as the mother, that she would have said the same thing; however, she added, that the tragedy had put her in the hospital with depression. She explained that the business was her whole life, and when the tragedy occurred, she could not handle it. She finally explained that only through prayer was she able to overcome the depression. She added that the mother had to pray to overcome her grief. The mother said she did not believe there was a God who would allow such a tragedy to occur. The women talked for an hour and when they finished they hugged each other, exchanged cards, and said they would pray for each other. Real healing had taken place and the mediator recognized the power of mediation.

[15]3 CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 20 (3d ed. 2003); see also, Jerome A. Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CAL. L. REV. 1201, 1205 (1966).

[16] Professor F.S.C. Northrop noted, that pursuant to Confucian thought.

last resort, the use of which signifies embarrassing failure to settle the matter amicably."[17] Today, both China and Japan place great emphasis on a conciliatory, non-adversarial approach to conflict resolution.[18] In Japan, for example, *"a conciliatory relationship between disputants is the foundation to resolving differences. In any dispute, time is first spent building that relationship without which a final agreement cannot be reached."*[19]

Modern day mediation places emphasis on the peacemaking and healing effects of the process. It emphasizes the need for mediators not only to be problem-solvers but harmonizers, peacemakers and healers.

B. Success of Mediation Using the American Model

There are any number of reasons mediation has proven so successful in America.

The 'first best' and socially proper way to settle disputes, used by the 'superior man,' was by the method of mediation, following the ethics of the 'middle way.' This consisted in bringing the disputants to something they both approved as the settlement of the dispute, by means of an intermediary. . . . 'Good' dispute settling consisted in conveying the respective claims of the disputant's back and forth between them until the disputants themselves arrived at a solution which was approved by both.
F.S.C. Northrup, *The Mediation Approval Theory of Law in America Legal Realism*, 44 VA. L. REV. 347, 349 (1958).

[17]Leonard L. Riskin, *Mediation and Lawyer*, 43 OHIO ST. L. J. 29 (1982). Today, mediation boards in China called Peoples Mediation Committees, are the primary institutions for resolving disputes. They handle over 7.2 million cases each year. Donald C. Clarke, *Dispute Resolution in China*, 5 J. CHINSESE L. 245, 270, n. 95 (1991).

[18]JAY FOLBERG & ALLISON TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION (Jossey-Bass, 1984) (noting the widespread use of conciliation and mediation to resolve disputes).

[19]Richard M. Calkins, *Caucus Mediation Putting Conciliation Back Into the Process: The Peacemaking Approach to Resolution, Peace and Healing*, 54 DRAKE L. REV. 259, 265-66 (2006).

a) Mediation is an Extension of Negotiation –

Mediation is really nothing more than a form of negotiations, which the parties nearly always engage in, with a trained third party, the mediator, participating. The presence of that third person, however, overcomes many of the shortcomings of straight negotiations, such as, one, straight negotiations tend to be adversarial in that counsel use advocacy skills to further their clients' causes. The skilled mediator, however, will try to neutralize the advocacy and encourage the parties and counsel to seek common ground.

Two, serious negotiations generally occur after discovery is completed and counsel understands the implications of both sides of the case. In mediation, discovery does not have to be completed. In fact, much mediation takes place before the case is even filed. Indeed, a certain amount of discovery will actually take place during the mediation itself.[20]

Three, because discovery is generally completed when serious negotiations take place, the heavy costs of litigation have already been incurred. Because discovery does not have to be completed in mediation substantial costs are avoided.

Four, negotiations can often be as stressful for the parties as going to trial. Mediation, on the other hand, vastly reduces the stress level.

[20]*Case Study:* Two women threatened lawsuits against a national bank for gender discrimination under Title VII of the Civil Rights Act of 1964. They contended that as branch managers they were not paid on a par with men holding the same position. Before suit was filed, the parties agreed to mediate. At the mediation, the mediator got the parties together and had the woman explain how they were discriminated against paywise compared to men, which they contended was as much as $25,000 (per year). The bank officials attending the mediation then emailed the home office and had the W2 forms (required by U.S. taxes which lists the income of the individual) of the male branch managers in the area of the country which was relevant forwarded to the mediator. When they were examined, it turned out the women had miscalculated and there was no discrepancy. In fact, one of the women was the second highest paid of the 15 W2 forms reviewed. With this disclosure the women settled their claims for nominal amounts. Allowing this discovery in the mediation avoided the filing of the case and a substantial amount of money and time being spent in pretrial discovery.

b) Mediation is by Contract –

A primary reason mediation is so successful is because it is by contract. It gives the parties total flexibility as to how they will conduct the process.[21] Unlike the courtroom trial with its fixed rules of evidence and procedure, which cannot be deviated from, mediation has no limitations or restrictions. Parties can contract to resolve their differences any way they wish, even create a new process on the spot. That is its genius. For example, when a new regional airline came on line in the United States, it had a trademark which was quite similar to another regional airline, so much so that one would have to give it up. However, neither liked the prospects of becoming embroiled in trademark litigation, which could cost in the millions of dollars. The two CEOs decided litigation was not the road to travel inasmuch as the loser would only incur an expense of $30,000 or so to develop a new trademark. Instead, they created a very different inexpensive process. They agreed to arm wrestle. For the cost of a party, the two CEOs resolved their dispute, two out of three.[22]

[21]Although the parties can use any mediation format they wish, the most common format is caucus mediation. It commences with the mediator and parties conducting an opening session with the mediator making introductory remarks and each attorney stating the merits of their cases. Thereafter, the parties are separated to different rooms and the mediator shuttles back and forth between them. In the caucus with each side, the mediator will inquire (1) the strengths of the party's case; (2) the weaknesses of a party's case; (3) what counsel feels is the party's best case/worse case before the judge; (4) what settlement discussions there have been; and (5) a new demand (plaintiff) or offer (defendant) is requested. If there is insurance involved as in an automobile accident, the mediator will inquire (6) as to the policy limits (an insurance company will not pay more than policy limits). If health insurance has been paid, the mediator will inquire (7) whether there are any subrogated liens. Finally, the mediator might inquire (8) what costs will be incurred to litigate the case.

[22]*Execs "Plane" Fun Avoid Lawsuit,* PITTSBURGH PRESS, March 21, 1992, at A4.
Case Study: The total flexibility of mediation was illustrated in a case involving partners who ran a lawnmower, snow blower, snowmobile repair shop. As the business grew, they opened a second shop in another place in town. After several years, differences arose and the partners could no longer get along. They decided to separate but could not agree on how to divide the business. Matters became so

Not only can the parties use any mediation format they wish, but they can change it even after the process has commenced. There is total flexibility to modify it, interrupt it, continue it, whatever. For example, they can stop the mediation and conduct a nonbinding summary trial,[23] to help the parties better evaluate the case, and then return to the mediation. A mediation can be continued to give the mediator a chance to investigate the case further,[24] or an expert

acrimonious that they could no longer even speak to each other. Their lawyers recommended mediation.

Arriving at the mediation, the mediator recognized that it would be most difficult to get agreement. He also recognized that the parties had to settle because allowing the matter to go to court would bankrupt both. To avoid this, the mediator suggested that the parties give him the authority to make a binding decision as an arbitrator. With the encouragement of counsel, the parties agreed and a written agreement was signed by the parties.

Because the partners could not face each other, the mediator put them in separate rooms and met alone with their attorneys. The group then discussed each issue in dispute and when the attorneys agreed, that became the ruling. The attorneys then relayed the result to their respective clients for approval and the group moved on to the next issue. In eight hours, the matter was resolved to the relief of all concerned.

[23]Thomas D. Lambros, *Summary Jury Trial – An Alternative Method of Resolving Disputes*, 69 JUDICATURE 286 (1986). The process, which normally takes a day to complete, permits the parties to submit their dispute to a private judge, or lawyer acting as a judge, who, after hearing will render a nonbinding decision as to the value of the case. Each lawyer presents his case in summary form and the judge renders a nonbinding decision. After, the parties can meet separately with the judge who will explain the basis of his decision. The parties can then resume the mediation.

[24]*Case Study:* Plaintiff became a paraplegic as a result of a single car accident. He and three underage teenagers had been drinking beer. Driving home, the owner of the car, a 16 year old boy, allowed his girlfriend, who was intoxicated, to drive the car. She lost control on a dirt road and the car crashed. Only the plaintiff was injured. He sued the owner of the car and the latter's insurance carrier attended the mediation. It defended on the ground that plaintiff, 21 years old and of age, bought the beer consumed by the underage passengers, including the driver. Plaintiff denied the allegation asserting that he only bought four wine coolers for himself. When the carrier would not pay plaintiff's demand of $1 million, the mediator asked permission to investigate further. He interviewed the passengers and owner of the car. The latter explained that he could not have purchased the beer because he was underage and there was no alcohol in his home. The mediator then met again with the plaintiff, who finally admitted he purchased the beer in question only the

witness can be called on the phone and asked his opinion even though not under oath.[25] A witness can be asked to attend the mediation over the lunch hour to meet with the insurance adjuster to discuss the individual's testimony if called at trial.[26]

Not only is there total flexibility as to the format used and as to how it is conducted, but also as to what can be included in any settlement. Unlike an action in a court of law, which can only render a money judgment, a mediated settlement can include anything the parties wish, even matters outside the scope of the lawsuit. For example, the parties can agree to include a written apology, or a letter of commendation or recommendation, or the naming of a conference

night before and not the night in question. With this admission, the case quickly settled at the next mediation session.

[25]*Case Study:* Plaintiff was injured in surgery when the surgeon negligently punctured his colon. This left him incontinent and unable to prevent the escape of gas, which was most embarrassing. Plaintiff demanded $300,000 and defendant offered $200,000. There was an impasse and the mediation was about to fail when the mediator asked plaintiff why he would not compromise further when his attorney recommended he do so. He responded that his doctor said the case was worth $300,000.

The mediator then suggested they call the doctor, which they did and the mediator explained the situation. The doctor then asked to speak alone with plaintiff. After five minutes, plaintiff said he would accept the $200,000. In other words, the plaintiff would listen to his doctor but not lawyer.

[26]*Case Study:* Plaintiff had his jaw broken when he entered a tavern and was hit by a red fire extinguisher thrown by the bartender. The latter had gotten into an argument with a patron at the bar, and when he threw the fire extinguisher, the latter ducked and plaintiff was hit.

At the mediation, the insurance carrier raised a coverage question stating that intentional acts, as occurred here, were excluded from the insurance policy. Plaintiff contended that the owner of the bar knew of the bartender's penchant for fighting and allowing him to remain in his employ was negligence which was covered by the insurance policy. The insurance adjuster said there was no such evidence, and plaintiff's counsel answered asserting there was a witness who would testify that six months before, the bartender had gotten into an argument and was reported to the owner. Arrangements were made for the witness to attend the mediation over the noon hour. After conferring with the adjuster, the case settled for a fair figure.

room after a deceased person, who was wrongfully discharged from his employment.[27]

c) Mediators are Trained to be Peacemakers –

The most successful mediators in America are trained to be peacemakers, to heal the wounds of the parties, not just resolve their differences. In other words, it places the profession on the pedestal with the other healing ministries, a wholly new calling for lawyers. And this training begins with self.

Mediators are taught that they must get their own houses in order. In other words, they must have a calm and uplifting demeanor so that their very presence at the mediation, will calm the parties. The mediator should remember that the parties enter the process angry, frustrated, and even hating each other. All are looking for help. They want to speak to someone who will listen with compassion and understanding. Above all, they want to like their mediator, and the latter must give them reasons for doing so. The mediator who is warm and accessible will immeasurably help the parties overcome that initial barrier, which is required to commence the process.[28]

[27]*Case Study:* Plaintiff was discharged from his employment after 29 years of faithful employment. New owners had taken over the company and computerized the accounting department where plaintiff worked. When he was unable to master the computer system, he was discharged. Feeling that he was discharged because of his age, 55 years old, he sued for age discrimination under Title VII of the Civil Rights Act of 1964. Six months later he died from unrelated causes, but his widow, who then sued on behalf of his estate, felt he died from a broken heart.
At the mediation, her final demand was $125,000 and the final offer was $100,000. Neither party would move further and the mediation was failing. The mediator, as a final effort, asked the widow if a written apology would help. She answered in the affirmative. She added that having the new owners take sensitivity training so that they would be more considerate of other employees would also help. The owners readily agreed to both conditions and the case settled for $100,000. In fact, she would have taken less, for her agenda was recognition by the company of her husband's dedicated years of service.

[28]There is perhaps no more difficult setting for mediation than in family disputes – divorce, child custody, division of property among siblings, etc. Traditionally, when

In entering the mediation, the mediator must prepare emotionally. Some very successful American mediators prepare by meditating, others by praying. One very successful mediator prepared by doing tai chi. The mediator should use any process that works. A warm, smiling, accessible demeanor sets the right tone. Northing will establish rapport and trust faster than the mediator who shows he is concerned and dedicated to finding resolution all can accept.

d) Successful Mediators are Patient, Positive, and Persistent –

Successful mediators in America have learned the value of being patient, positive and persistent. No matter the scenario or challenge, the mediator cannot show impatience, frustration nor discouragement. Such are contagious and undermine the process. Parties will instantly react to any negativity and give up and resign themselves to failure.

i. Patience:

Being patient means the mediator will control his temper and frustration level. To criticize a lawyer for not cooperating or make a sarcastic remark because a person is acting unreasonably, even when justified, undermines the process and probably spells failure. Some lawyers in America have a tendency to waste time extolling their skills and virtues, and there is the temptation to put them in their place. Although warranted, the temptation should be resisted for it is highly counterproductive.

There are even times when a lawyer may challenge the mediator for not moving the process along fast enough, or blaming him when the other side is not making reasonable offers, or is not acting in "good faith." They might even challenge the mediator's neutrality or impartiality. The patient mediator will not react to such negativity. To do so merely reinforces what the person is saying.

lawyers get involved, it only adds to the rancor and tension. The mediator must be alert to still the storm at the outset.

Being patient also means the mediator must be attuned to how fast he can move the process along. A reluctant party should not be pushed too hard or too fast to compromise. The mediator does not want to appear as though he is impatient or frustrated with the party or is joining with counsel to push for a result that party is not yet ready to accept.[29]

[29]When a party is resisting the recommendations of counsel, there is the temptation to jump in on the side of the attorney to explain why the party must compromise. This can give the appearance that counsel and the mediator are "ganging up" on the party. This can lead to even further intransigence. The better course is to remain patient, and if a split occurs between counsel and his client, because the latter is not willing to listen, not to join counsel in pushing the party. If a major split occurs, the mediator can then step in and work with the party even if the services of counsel have been terminated.

Case Study: Plaintiff exited her office building and walked down a driveway to reach a mall for lunch. It had snowed heavily that morning and the driveway had not yet been plowed. The front steps of the building and walk had been cleared and plaintiff could easily have exited by way of the front door and safely reached the mall. In walking down the driveway, she stepped on a patch of ice covered with snow and broke her ankle. She sued.

At the mediation, the insurance carrier offered her $35,000, which counsel urged her to take. The mediator joined counsel explaining how difficult it is to recover for slip and fall on ice in a northern climate. Plaintiff resisted demanding $60,000 and not a penny less. Counsel and the mediator pushed harder and plaintiff finally asked, "who's side are you on? Why don't you support me? It was clear that plaintiff felt the two had "ganged up" on her and she was not going to give in. She went to trial and received nothing. A defense verdict.

Case Study: In a later case, the above mediator faced a similar situation but handled it quite differently. Plaintiff had received a settlement of $750,000 in a malpractice action brought against a surgeon on behalf of her deceased husband's estate. She purchased an insurance policy with the proceeds. An insurance agent from another insurance company talked her into switching policies with his company. She did and subsequently had to pay a large income tax, which the agent had not mentioned. With the tax she was considerably worse off.

Plaintiff sued the insurance carrier and agent for fraud. Counsel told her she could possibly recover over $1 million as had occurred in a case in Texas. At the mediation, when the mediator inquired what plaintiff's best case was, and he responded $150,000, she jumped up and slammed her purse on the table and fired her lawyer on the spot for deceiving her. The mediator resisted the temptation to jump in and explain what had happened – in Texas the agent knew of the tax consequences but did not disclose it; therefore, there was fraud which led to punitive damages. In the instant case, the agent had not known of the tax

This raises the question whether the patient mediator should keep the parties at the table until late at night, while the "iron is hot," until the parties capitulate out of exhaustion. The concern is that if the parties are allowed to go home and think about the matter, they will harden their positions, which will make settlement that much more difficult. It is here suggested that the patient mediator will continue the mediation and allow the parties to consider the matter further in a quiet setting. Experience shows that parties, when given the opportunity, will not make their positions worse, and more times than not, will improve them so that settlement becomes possible. Indeed, time works for the mediator, not against.[30]

consequences; therefore, he was only negligent and there could be no award of punitive damages.

By not trying to explain what happened and remain patient, the mediator was allowed to continue with the process when counsel left. The case then resulted at a fair settlement.

[30]There is a process called "pillow talk." When a member of a family is involved in a lawsuit and is having difficulty settling and other members of the family are concerned about the adverse impact litigation is having, it is productive to continue the mediation and permit the family in a quiet setting to speak to the person. Nearly always members of the family seeking resolution will win out and the matter will settle. As between husband and wife, if one wishes to settle and the other does not, allowing them time to pillow talk the matter usually results in a settlement.

Case Study: Plaintiff, as a healthy newborn little girl, was given a diphtheria, pertussis, tetanus shot and had a severe adverse reaction leaving her crippled. At 17 years of age she had the mentality of a six month old baby. She spent days sleeping in a fetal position. Her parents hired an attorney and he sued the doctor for malpractice. The case was settled and plaintiff received $80,000, which netted her $34,000. Later, the parents learned there was a federal statute, the National Vaccine Injury Compensation Act, which provided up to $2 million for children injured like the plaintiff. Her parents then sued the lawyer for legal malpractice for not informing them of the Act.

At the mediation the insurance carrier was willing to pay the entire $1 million of coverage to settle the case. The father rejected it as an insult. The mother said nothing but her reaction indicated she wanted to get the matter resolved. The adjuster suggested that the matter be continued to allow the parents to have time to consider the matter in a quiet and reflective setting. "They will pillow talk the matter," the adjuster stated. Five days later, the father called accepting the offer.

ii. Positiveness:

The skilled mediator is positive at all times. This means several things: First, the parties are on a rollercoaster ride. They start the mediation feeling that the matter will be settled. However, after a period of time they realize how far apart they are and discouragement sets in. As the day progresses and progress is made, the fires of hope are rekindled, only to be doused at the end of the day when a gap still exists. The mediator cannot be on that rollercoaster. The mediator has to be encouraging at all times, for any negativity is contagious.

The mediator needs to counteract the ups and downs of the parties by assuring them that what they are experiencing is expected, it is a normal reaction that occurs in all mediations. It is not out of the ordinary. And, indeed, the ups and downs do normally occur and yet the case still settles.

Second, in America, top mediators will have a success rate of over 90 percent; some as high as 96 percent.[31] So there is every reason to be optimistic. The mediator should emphasize how successful mediation is and the parties have every reason to expect the matter will be resolved.

Third, the mediator should emphasize positive signs on each side. A party or attorney who is becoming more cooperative should be mentioned. Or, if one side says something positive about the other this also should be mentioned. By contrast whatever is said that is negative and should not be relayed.

Fourth, there are times when parties become frustrated and threaten to terminate the process. Generally, this is for show and is intended to get the attention of the mediator and, in turn, the other side. The mediator must see it for what it is and not panic or show concern.

[31]RICHARD M. CALKINS & FRED LANE, LANE & CALKINS MEDIATION PRACTICE 4-16 (Aspen Publishers, 2008).

Seldom will parties walk out of a mediation until the mediator releases them because he can do nothing more.

Fifth, when the parties make unreasonable demands or offers, the mediator should not react or attempt to force them to be more realistic. Counsel knows when a demand or offer is unrealistic but has chosen to take this approach probably for a reason: he may be testing the mediator for bias expecting him to react negatively, or counsel has done so because the client is not yet ready to be realistic, or counsel is signaling that the client is going to be difficult. Whatever the reason, the mediator should not react negatively, but explain to the other side this is not unusual, it is to be expected parties will start out unrealistically.[32]

Sixth, being positive is also conveyed by body language. If the mediator walks into a caucus room frowning, the parties will interpret this as a bad signal. The mediator should at all times look positive, even when there is little to report. The mediator knows that given time the case will settle even if it starts out slowly for most cases do.

iii. Persistence:

The mediator should be persistent. He should never give up or terminate the process. The biggest complaint the author receives about mediators is that they gave up too soon. The mediator should keep trying until the parties actually terminate his services and refuse

[32]When a plaintiff demands $500,000 in a minor case not worth more than $20,000, for example, the mediator should not show surprise or disapproval. The mediator should take the position, if you don't ask, you don't get. When disclosing the demand to the other side, the mediator can explain that such an initial demand is not unusual nor out of the ordinary. The other side should simply respond in kind and get the settlement process started. As long as the parties understand that nothing unusual is happening and what occurred is expected, they will remain hopeful. Only if the mediator shows concern or frustration will the parties be negatively impacted.
It is interesting, that in America first demands and offers are frequently unrealistic and even outrageous; however, the cases still are settled.

to pay any further fees. Until the parties do terminate him, progress will be made.

There are times when a party or counsel informs the mediator they are packing their bags to leave. More times than not it is a show of force. It is not grounds to terminate. The mediator simply needs to keep the process moving forward.

Persistence also means that if the bidding, the demands and offers, is bogging down and the parties are showing concern, the mediator should assure them there are other ways to proceed. There is a plan B and C, if plan A is failing. Parties can become anxious and frustrated if the bidding breaks down and the other side is not "acting in good faith." Plan B, for example, is the mediator can bracket,[33] or propose a mediator's figure[34] to restart the process.

If the parties are unable to settle the matter during the opening mediation session, the persistent mediator will push the parties to set another day to resume. Or, he will schedule private meetings with

[33]Bracketing is used in two ways: One, it is used to break a logjam when the parties are unwilling to make further moves in their bidding. For example, if plaintiff announces he will not go below $1 million and the defendant above $500,000, the mediator can approach both and explain that unless plaintiff will go below $1 million the mediation will be terminated. Similarly, defendant must go above $500,000 or the action will be terminated. No effort is made to say how much below $1 million or above $500,000. If the parties agree, the mediation continues.
The second way bracketing is used is for the mediator to ask the parties to consider new figures, a figure below plaintiff's last demand and above defendant's last offer. For example, if plaintiff's last demand is $750,000 and defendant's offer $300,000 the mediator might ask plaintiff if it would lower its demand to $500,000 if defendant would raise its offer to $400,000. If both agree, the gap to settlement has been narrowed.
Richard M. Calkins & Fred Lane, *supra* note 31, at 7-3.

[34]A mediator's figure is offered towards the end of a mediation when the parties are still somewhat apart. The figure is not what the mediator thinks the case is worth, but a figure which will push both parties to accept. Thus, if plaintiff is at $750,000 and defendant at $300,000, the mediator might propose a settlement at $450,000. Both parties are asked to consider the figure and in confidence indicate acceptance or rejection. If both parties accept, the case is settled. If either rejects it, there is no settlement; *Id.*, at 7.6.2.

each side at their offices inasmuch as it is not required the parties physically get back together.[35] The mediator can also continue the mediation by telephone explaining that he will be calling each in the next few days.[36]

e) Mediations are conducted in a Confidential Setting –

Another reason mediations are so successful is because they are conducted in a confidential setting and not open to public scrutiny. In the courtroom, the proceedings are public and all can view them or

[35]If the mediator has scheduled to meet with the parties separately after the initial mediation session, he should prepare carefully. He might prepare a video of depositions or a memorandum explaining the concerns he has with each party's case. Or, he can do research on legal questions that have arisen in the mediation.
Case Study: Plaintiff, a mother, brought a lawsuit against a trucking company, when one of their trucks crashed into her van in a blizzard, killing two of her children. At the mediation, the carrier insuring the trucking firm offered an insufficient amount of money and the mediation ended. The mediator requested an opportunity to meet with a vice president of the insurance company to point out how serious the case was. Arrangements were made. In preparation, the mediator had a thirty-minute video prepared of two depositions taken in the course of discovery. The first was of another trucker who, aware that there were icy roads ahead, straddled the middle of the interstate highway with flashing amber lights to slow down the traffic. He testified that the defendant trucker sped by him traveling on the shoulder of the highway, and as he did he made a profane gesture. The second part of the video showed the defendant driver who had a beard and seemed to be unconcerned that two children had been killed. He blamed the mother for traveling in a blizzard. The mediator showed the video to the insurance company's vice president, who, after seeing it and realizing the implications, raised his offer substantially to settle the case.

[36]Unless the parties outright terminate the mediation, the mediator should inform them that he will contact them by telephone and keep the process going. Thereafter, he should periodically talk to the attorneys on each side to determine if progress is being made. Even if there is no progress to report, the mediator should periodically make contact. This has the benefit of (1) alerting the lawyers that the mediator is still thinking about the case, (2) determining whether there has been any changes in positions, (3) determining whether there are any changed circumstances, (4) alerting counsel that the matter is still pending (they sometimes get busy with other cases and neglect the one in question).

make inquiry. The press can sensationalize a public trial, which could never occur in mediation.[37]

The benefits of confidentiality over a public courtroom encounter are several.

First, it permits the mediator to speak to each side separately, called a caucus, and inquire about confidential matters. The mediator can ask questions never before asked in American jurisprudence. He can ask questions a lawyer, judge, or arbitrator could never ask. For example, he can inquire as to the weaknesses or concerns counsel has in the case, or what counsel believes is the party's worse case before the trier of fact. Counsel generally is willing to discuss such matters because he is assured that his answers will remain confidential and under no circumstances shared with the other side. When the mediator garners such information on both sides, he has a grasp of the case never before enjoyed in American courts. He is positioned to give guidance towards a meaningful settlement.[38]

[37]Most agreements to mediate provide that any information disclosed in private caucus will be kept confidential. Also, the parties agree not to subpoena the mediator or seek to obtain his notes or work product. Richard M. Calkins & Fred Lane, *supra* note 31, at 3-6.

[38]*Case Study:* Seven plaintiffs as children were sexually abused by the same cleric over a period of several years. The abuse was admitted by the religious order being sued, to which the cleric belonged; however, it defended on the grounds of statute of limitations. In private caucus, counsel for the religious order recognized that although six of the plaintiffs would be barred by the statute, the seventh, who had been in the Marines for twenty-seven years, would not be barred (statute of limitations does not apply under law to those serving in the military). Although counsel could get six of the cases dismissed, the one case going to trial would probably result in a verdict which would exceed for what all seven cases could be settled. He also admitted he was concerned about the timing of the trial because there had been very bad publicity concerning clerics who were pedophiles and that could influence the court.

In caucus with the plaintiffs' attorney, he admitted in confidence that six of his clients would be dismissed because barred by the statute of limitations. He suggested that the six would have to accept whatever the religious order offered. He also recognized that he had been placed in a conflicts of interest situation in that the religious order stated it would not settle unless all cases, including the ex-

Second, maintaining confidentiality may be important to both parties. A public trial might just invite additional lawsuits against the defendant or embarrass the plaintiff.[39] By not allowing the case to go public, both parties are protected.

Third, because each side can speak to the mediator in confidence, ex parte, they can get the mediator's reaction to the merits of the case. They can suggest possible ways the case might be settled and ask the mediator to make inquiry of the other side without disclosing their interest. They can ask the mediator to float a settlement figure, again, without disclosing that they suggested the figure.

Fourth, in confidence the mediator can float his own settlement figure and ask each side to consider it. Only if both sides accept will he indicate a settlement. If one side does accept and the other does not, there is no disclosure. Confidentiality is maintained.

Fifth, confidentiality permits the parties in their separate caucuses to vent and speak to a willing listener, the mediator. Many times parties just want someone to whom they can tell their stories. This can be

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Marine, were resolved. This, counsel felt, put pressure on him to get the ex-Marine settled so that something would be paid to the other six. This might require separate counsel being appointed. With these facts in hand, the mediator got the case settled inasmuch as both had concerns.

[39]*Case Study:* Plaintiff worked in an insurance office as a secretary. Some of the salesmen and other secretaries started telling dirty jokes, putting up pornographic pictures, and exchanging sexually explicit gadgets. Plaintiff was reluctant to complain for fear the others would tease her. She finally did and the result was as she predicted. She quit her job and threatened to sue the insurance company for allowing the conduct to occur (under Title VII of the Civil Rights Act of 1964).

In private caucus, plaintiff explained she wanted to get the matter resolved because a public trial would subject her to ridicule and teasing. This could embarrass not only herself, but her family and school-aged children. The insurance carrier wanted confidentiality because any public hearings would open it up to bad publicity. The conduct in its office was so offensive, that CNN News might pick it up on a slow Sunday evening broadcast. Both lawyers resisted settlement, each feeling they could win at trial. However, confidentiality for very different reasons had great value to the parties and the case settled.

very therapeutic.[40] In the private caucus, this opportunity can be provided without offending the other side. Many times, the mediator is thought of as a judge, which gives the venting even more meaning.

Sixth, caucus mediation, with its umbrella of confidentiality, is ideal when parties cannot face each other such as in divorce. When there has been physical abuse and intimidation, forcing parties to face each other may do much more harm than good. Therefore, the parties can be placed in separate rooms in the beginning and the mediator can shuttle back and forth. They can go to lunch separately, and even sign the settlement at separate times thereby avoiding facing each other.

f) The Private Caucus Permits the Mediator to Identify Hidden Agendas

Another reason mediation is so successful is it facilitates the mediator in identifying the needs and interests of the parties as well as hidden agendas, which might influence the outcome of the case. In the courtroom trial such needs and interests are irrelevant and never addressed. In mediation, they are all important, and, once identified can resolve a matter. One of the critical tasks of the mediator is to search out these hidden agendas.

[40] *Case Study:* Plaintiff was a senior vice president of a major corporation. He had a dark secret, which he had not even told his wife. He had been sexually abused as a child by a pedophile cleric. When the abuse came to light he only asked for an opportunity to speak to the bishop of the diocese where he went to school. He flew in from Ohio and appeared at the mediation wearing a coat and tie. In a low firm voice he explained how he had been abused and the life –long injury this had caused. Finally, he asked the bishop if he would like to know how angry he was. Without waiting for an answer, he opened up his brief case and pulled out a 12 inch plastic tube. He attached a four inch tube to one end and took tape off the other. He had a dagger which he pointed at the bishop, not as a threat, but to make a point. He was, of course, told to leave the potential weapon at the mediation inasmuch as carrying it on a plane is a federal felony. He did and the case settled.
Two days later, plaintiff's wife called their attorney and explained that plaintiff seemed quite relieved, having told his story. She felt healing had begun.

Being able to talk to a party in private, one on one, without the other side present, facilitates the mediator in identifying the real agenda of the parties. For example, many times a party is distressed by the pendency of the lawsuit and simply wants to end it so the person can go on with life. Knowing this, the sensitive mediator can work towards an immediate resolution fair to both sides.[41] The hidden agenda may be as mundane as settling immediately to have funds to move to a better school district for the benefit of children, or to protect the reputation of a regional heart transplant center.[42] Or, the

[41]*Case Study:* Defendant drove a school bus and ran over a child in her first week of kindergarten. The driver was distracted when a car was speeding towards her stopped bus and did not see the child crossing in front of her when she started forward. She went into serious depression, and two years later, could not be deposed or attend the mediation. The mediator, recognizing that the lawsuit was having devastating consequences on her, pointed out to the plaintiff's counsel that the humane thing was to dismiss her from the lawsuit. He argued that the school district was liable and she had no funds to cover a large judgment. In fact, her presence made plaintiff's case weaker because a judge might feel great sympathy for the driver because of her condition. Plaintiff's counsel agreed and dismissed her from the case. She was immediately informed with the hope the healing process would begin. Here the need was patent and immediately addressed.

[42]*Case Study:* The decedent was 17 years old and had a heart attack at football practice. He was taken to the defendant hospital and hooked up to a portable defibrillator. Later, the equipment was changed and a second one was hooked up; however, the nurse got her wires crossed and decedent died in two hours. Decedent's mother sued on behalf of his estate. The estate demanded $2 million and the hospital offered $500,000. Later, the mediator recommended $1 million, which both parties accepted.

At the mediation, the mediator discovered several hidden agendas which materially furthered settlement. With the hospital, the mediator learned that it wanted to avoid the adverse publicity of a public trial because it was trying to build its reputation as a top heart transplant facility. Also, it felt that if the matter was settled, investigators would drop any criminal charges being brought.

Decedent's mother had a very different agenda. As a single mother, she and her six children lived in the poorest district of the city and attended the weakest schools. She wanted immediately to relocate to the best school district to benefit her other children, ages 7 to 16. Waiting for the case to wind its way through the courts, would mean that four of her children would not benefit because they would be out of school.

Plaintiff's attorney, however, also had an agenda. He wanted the family to move into his school district so that two of the boys, who were excellent basketball

hidden agenda might be to settle immediately to obtain funds for psychiatric treatment of a twice convicted felon, who was sexually abused as a child, to avoid a third conviction on drug charges and mandatory life imprisonment.[43]

Special interests like needs impact on settlement possibilities. When properly identified, the mediator can help a party satisfy those interests as part of the settlement. For example, a company may be planning an initial stock offering and does not wish to include in its prospectus the pendency of a multimillion dollars lawsuit against it. This would seriously affect the initial stock value. It is in the interest of that party to settle the case immediately.[44]

g) The Mediator is Supportive of Counsel –

An important advantage of mediation over the courtroom trial is that the mediator can be supportive of counsel when he has difficulty with an intransigent client.[45] The mediator can be of assistance for several reasons.

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players, could join his son's team. This would assure the team at least a city championship. He had already picked out a house.

[43]*Case Study:* Plaintiff completed a five-year prison sentence for illegal possession of drugs. He had been sexually abused as a child by a cleric and traced his problems back to the abuse. He was willing to compromise on his demand to get immediate funds for psychiatric treatment. He recognized that a third felony conviction would require a life imprisonment sentence.

[44]*Case Study:* Defendant, a computer company, contracted with a bank to install a computer system to handle its newly formed credit card business. After completion of the contract, the bank sued for $8 million, asserting that some of the systems were not completed and some were defective. Ultimately, plaintiff lowered its demand to $2 million and the defendant raised its offer to $800,000. At this point the mediator learned that the computer company was going public and it could not allow an $8 million claim to remain because it would have to include it in its prospectus. This would affect the value of the stock offering.

The mediator did not push the parties well-knowing that defendant had to settle. It did agreeing to pay $1.3 million.

[45]An alert mediator will at the outset of the mediation determine if one or both of the parties are going to be difficult. Many times counsel will simply tell him, while other times the mediator will have to reach such a conclusion by action of the parties reacting to their respective attorneys. For example, if, when the mediator

First, by inquiring what the weaknesses are in the case, and what is the worst result counsel expects from the judge, the mediator can reinforce some of the things counsel has been telling the client. Likewise, the mediator can inquire how long it will take to conclude litigation and what the out-of-pocket costs will be. In doing so, the mediator might impress the party with some of the difficulties of litigation.

On the defense side, different dynamics are at work. If a defendant is being unrealistic in its offers, counsel is often looking to the mediator to explain why more should be paid. Counsel does not want to look like he made an error in what he recommended in the first place. It might show he had inadequate skills in evaluating the case, or he is now fearful of going to trial. In carrying the burden of asking for more, the mediator can help counsel avoid a problem with the client.

Another way the mediator can be supportive is to be quick to compliment counsel for the work being done. If counsel prepared a good pre-mediation statement or made an above average opening statement, this should be commented on in front of the client. On the plaintiff side, these remarks will encourage the client to trust and respect her attorney. On the defense side, it will help cement the attorney/client relationship.

Second, in being supportive of counsel, the mediator needs to be careful not to cross over the line and support the attorney against the client. If a client is being intransigent, there is the temptation for the mediator to join with counsel in explaining why the party must compromise further. If pushed too far, it may appear the two are "ganging up" on the client and this will only make compromise more difficult. The better course is for the mediator to monitor the situation, and if it appears there is the potential for a split between the

asks for the weaknesses in the case, and the attorney turns to the client and discusses them, this signals a difficult client because previously the client would not listen. Similarly, if the party sits with arms folded and will not look at the mediator, even when spoken to, this also signals intransigence.

attorney and client, the mediator should remain neutral and not side with the attorney. The mediator can then continue the mediation should services of the attorney be terminated.[46]

Third, the mediator can assist counsel with a difficult client by building rapport and trust with the person. This can be done by inquiring about family, interests, sports, whatever they may have in common. The mediator knows that if he can get the party talking about matters of which there is common interest, rapport and trust are built. If a friendship results, the mediator also knows that it will be much more difficult for a party to turn her back and reject a proposal the mediator may be making.

Fourth, the mediator can be of assistance to counsel helping him evaluate the case. The mediator can refer to other settlements similar in subject matter. He can refer to verdicts in the venue or comparable venues. Being neutral, the mediator can also be more objective in helping counsel evaluate the case. He can identify problems counsel might just be overlooking.[47]

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[46]*Case Study:* Plaintiff was seriously injured in a car accident. The insurance carrier ultimately offered $125,000, which plaintiff's lawyer and her husband urged her to accept. She resisted saying she wanted $250,000. As the two tried to push her, her resistance increased. The mediator did not side with counsel, but remained quiet. He finally asked if he could speak with plaintiff alone. He then said he understood her feelings and that the others did not fully appreciate how much pain she was in. He explained that if she wanted to go to trial to get more, he would be supportive. However, he added that if plaintiff wanted to get the matter resolved that day and not wait three years, $125,000 was all she would receive. She asked the mediator what he would do and he suggested settling because the lawsuit was having a serious impact on her. She took the mediator's advice and settled.

[47]*Case Study:* Plaintiff was sexually abused by a cleric when he was 14 years old in a parochial high school. He was abused twice; however, the abuse had lifelong adverse effects. He hired counsel and brought suit even though some 58 years had elapsed since the abuse occurred. His attorney demanded $1 million. The religious order, named as a defendant, contended that the action was barred by the applicable statute of limitations. Plaintiff's counsel contended that plaintiff had repressed memory which tolled the statute of limitations until he became aware of the abuse.
The mediator, in private caucus, asked plaintiff's counsel what the statute of limitations was. He thought it was one year after reaching the age of majority, (18

h) Caucus Mediation is Ideally Suited to Handle Complex Cases

Handling a protracted multiparty case can be challenging to the best of judges. No matter the complexity, they must try it as any other case because they must follow the rules of procedure provided. To deviate risks an appeal and reversal. The mediator handling the same case is not so encumbered and has total flexibility how to handle the matter. There are no set of rules carved in granite, no procedure that must be followed, no protocol that must be adhered to. The following procedures could only be utilized in mediation.

i. *Multiple Defendants Seeking a Global Settlement:*

When there are multiple parties in a complex construction case or commercial sales case, parties generally wish to find a global settlement. The mediator can take the following steps:

First, after the opening caucus with the plaintiffs and a global demand is made, the mediator can meet in caucus with all defendants. They can discuss their joint strengths against the plaintiffs. However, discussing their weaknesses should be left to individual caucuses because one defendant's weaknesses may be strengths of another, and if the case goes to trial defendants may be turning on each other in an effort to limit liability.

The mediator can also inquire what the defendants believe is their best case/worse case before the judge. This should be done with each listing on an unsigned piece of paper what it believes is the best

years old), but he wasn't sure because the case was filed in a different state, Ohio. He was from Illinois. A quick search was made. An Ohio Supreme Court case was found which held, to the chagrin of plaintiff's counsel, that Ohio had a 12 year statute of limitations and the state did not recognize repressed memory. As a result, plaintiff's counsel recognized his case would have to be dismissed for more than 18 years had elapsed. Plaintiff quickly came down in his demand and the case settled for $115,000).

case/worse case.[48] The mediator can then collate the responses and announce the collective opinion. A global offer can then be made.

Second, after the global caucus, it is desirable that the mediator schedule individual caucuses with each defendant.[49] At this time the mediator can become better acquainted with each and better understand the defenses each is asserting. More important, at this time, the mediator can ask in confidence what each defendant's weaknesses are. Inquiry can also be made as to how each defendant views the other defendants and what is the best way to proceed.

Third, in the same individual caucus, the mediator can ask each defendant to designate the percentage of fault of each other defendant as he sees it. Dropping the percentage allocated for his own client, the mediator can collate the responses. This gives the mediator the best appraisal possible of the responsibility of each defendant.

Fourth, when a settlement figure is reached with the plaintiffs, the mediator can allocate percentages among the defendants as set forth above.

ii. *The Domino Effect:*

Many times when there are multiple defendants, one or more will decline to pay their fair share of a proposed settlement. Often a primary defendant will insist that all defendants pay equal shares; however, those least responsible will only be willing to pay their fair share.

The mediator can handle such a challenge by encouraging the plaintiff to begin settling with the defendants one at a time, the domino

[48]In America, lawyers tend to compete for clients. If each lawyer is asked orally to state the defendants' best case/worse case, each will attempt to outdo the others present to demonstrate how aggressive and tough he can be, and a candid opinion is not likely to be achieved.

[49]In scheduling caucuses among defendants, it is preferable that the mediator release those not immediately scheduled so they don't sit around all day waiting for a half-hour caucus. Holding them all day only increases their impatience and frustration levels.

effect.[50] Either by settling with the most responsible defendant first (even at a discount to get the dominos falling) and working down the chain, or beginning with the least responsible and working up the chain, the mediator can isolate those defendants not cooperating. With each defendant removed there is one less to share costs, and presumably one less expert to testify.[51] This put more and more pressure on those remaining.

Also, in each case involving multiple parties, lead counsel is normally appointed to coordinate the defense. It is effective if the mediator can target that person and their client for settlement as the first domino.

[50]There is a concern that settling with some and not all defendants leaves "empty chairs," that the remaining defendants can point to and deflect the blame from themselves. However, fewer defendants increase the burden of those remaining, which offsets the risk.

There is a caveat using this process. When the mediator is using the domino approach, he must always communicate with those remaining in the case and inform them of what is happening. As defendants are dismissed from the case, those remaining will become upset and will feel imposed upon and even betrayed.

[51]*Case Study:* Plaintiff, a plumber, was burned over 50 percent of his body when he was involved in a propane gas explosion. He had been doing pluming work for an elderly lady when she asked him to light her pilot light in the basement. She did not inform him that her propane gas tank had just been filled. Attempting to purge the line of air, he took off the nozzle to the line to increase the size of the opening. He heard a hissing sound, but assumed it was air escaping. After twenty seconds, to determine whether gas was flowing, he lit a match and the explosion leveled the house.

Plaintiff sued the manufacturer of the ethyl mercaptan (odorizer added to the propane gas to give it a smell), the pipeline company that transported the gas, three wholesalers, and the retailer who filled the tank in the first place. The latter, who was primarily at fault, would only agree to split damages six ways equally. If the others would not agree, he would refuse to settle.

The mediator met with plaintiff's counsel and suggested they use the domino process to isolate the retailer. He suggested they start at the low end and work up the chain. Plaintiff agreed. They first contacted the manufacturer of the mercaptan, and, to get the first settlement, offered to settle for less than plaintiff thought the claim was worth. It settled. Thereafter, the mediator met next with the pipeline company and got a second settlement. He then met with the wholesalers and they acquiesced. When the retailer was left without co-defendants, it realized it faced a potential loss exceeding policy limits. With that realization and the increased costs it faced, the retailer settled.

To take lead counsel out of the case has much greater impact on the remaining parties.

iii. Using Pre-mediation Caucuses to Develop Strategies:

In a complex case, it might be desirable to conduct pre-mediation caucuses with each party and counsel.[52] The purpose is three-fold: first, it gives the mediator a chance to learn what the case is about from each party's perspective. This will cut the required time when the mediation in chief is conducted.

Second, it permits the mediator to become acquainted with the parties and counsel, and begin building the required rapport and trust. Because only the strengths are discussed, the mediator has a chance to show interest in the parties and their activities.

And, third, it helps the mediator begin developing a strategy to resolve the dispute. When there are claims, counterclaims, and cross claims, the mediator needs to develop a plan to address each. This might include dropping a party or claim because not covered by insurance, or realizing plaintiff's targets and priorities.[53] To simply

[52]Pre-mediation caucuses should not be utilized unless all parties agree to participate. To caucus with some and not all would give the appearance that the caucusing parties gained an advantage.

[53]*Case Study:* A university president and vice president developed a plan to make the school a for-profit institution and expanding it to foreign lands. Ultimately, the board of governors rejected the plan and they resigned. They contacted another university, which accepted the plan and hired the two to implement it. The first university then sued the second for (1) breach of trade secrets, (2) conspiracy, (3) fraud and deception, (4) intentional interference with contractual rights, (5) breach of fiduciary duty, and (6) breach of contract. The latter two counts covered only the president and vice president who left the university, and were not covered by insurance.

Pre-mediation, the mediator met with counsel for each of the parties and developed the following strategy. First, he felt it was necessary that plaintiff drop the fifth and sixth counts because not covered by insurance and said officers had no assets of their own to satisfy any judgment. Also, the insurance carrier, insuring the first four counts and the second university, would take the position that the whole incident was caused by the two officers and that the second university had no exposure. Second, the two officers were represented by separate counsel; however, the carrier would pay them only two-thirds of their fees because, again, the latter two counts

enter a complex mediation without a plan can increase costs and risk a greater chance of failure.[54]

were not covered. As it turned out those two were the best trial lawyers and if the case went to trial, the carrier wanted them in the case. They indicated they were withdrawing if not paid in full. Third, the mediator encouraged plaintiff's counsel to make a thorough and convincing presentation to impress the insurance representative attending the mediation. They were from New York City and might not appreciate the skill level of an Iowa lawyer. Counsel followed the strategy outlined and the case settled for a substantial sum of money.

[54]*Case Study:* Decedent took out a life insurance policy for $10 million. However, he falsified his medical record at the insistence of the insurance agents who sold him the policy. He died within 18 months of issuance and the insurance company discovered the fraud and filed a declaratory judgment action to rescind the policy. The decedent's estate counterclaimed against the carrier to enforce the policy on the grounds that the insurance agents were agents of the insurance company and therefore knowledge of his medical condition was attributed to it. The insurance company then filed a second action naming the estate and insurance agents as defendants and pleading fraud and conspiracy to defraud. Motions for summary judgment had been filed by both the estate and the insurance company on the issue, were the insurance agents, agents of the insurance company or the decedent?

In the pre-mediation caucuses conducted with the respective attorneys, the mediator began to work out his strategy. First, the insurance agents had a combined $8 million in errors and omission coverage. Second, the agents were most likely agents of the decedent rather than the insurance company because (1) they sold policies for other companies, (2) they did not operate under the auspices of the carrier, and (3) there was another insurance company through which the agents in question operated, which had direct connection with the carrier. Third, even if agents of the carrier, the charge that they conspired with the decedent to defraud the insurance company in question would negate any claim that they were acting on behalf of the carrier. Fourth, and most important of all, as long as the carrier's claim for fraud was in the case, the estate could not reach the agents' $8 million in insurance because there was an exclusion for fraud. Thus, it was important to get the carrier out of the case and sue the insurance agents for their negligence and breach of fiduciary duty. They had induced the decedent to falsify his medical record believing that he would live more than two years and therefore the policy would have become incontestable and collectible. They miscalculated. Fifth, the strategy was, therefore, to convince counsel for the estate to settle with the insurance carrier and have it (1) dismiss all claims against the estate and agents, and (2) pursue the claim against the agents for negligence and breach of fiduciary duty. This strategy was followed and the matter resolved.

i) Mediation Can Accommodate More Than a Dollar Resolution

In a courtroom trial, a judge can only award a dollar amount. There is no opportunity to consider non-economic options, such as, as noted above, an apology or letter of commendation, etc. The mediator can consider other possibilities and include them in any settlement so long as the parties agree.

There is, however, another major consideration which could not arise in the courtroom. It is the peacemaker's ultimate tool. If the mediator can get the parties to apologize and forgive, resolution and healing are assured. It is the ultimate goal of any mediator.[55] Forgiveness in particular, takes courage, but with it comes an inner peace and serenity. It gives the person a new sense of dignity whether in divorce, personal injury or sexual abuse.[56]

The great South African president, Nelson Mandela, shows how the power of forgiveness of just one person can help heal a nation. After his stunning election as president of South Africa in 1994 (after being

[55]*Case Study:* The author has mediated over 800 cleric pedophile and ephebophile cases. Victims suffer life-long depression, drug and alcohol abuse, incompatibility with the family, and even criminal conduct resulting in felony convictions. One African American male child was turned over to a cleric because the mother could no longer support the child. The cleric agreed to raise him as his son. Shortly after, the cleric put a ring on his finger and called him his wife. For six long years he abused the child in the worse way imaginable. At the time of the mediation, he was an adult and appeared in a coat and tie. He explained he was happily married, had three beautiful daughters, had a fine job, owned his own house in Atlanta, and felt life was good to him. Asked how he had recovered, he answered simply that he had forgiven the cleric and the church that shielded him. He added, he was a sick man but I loved him as a father.

[56]Mark Bennett & Christopher Dewberry, "*I've Said I'm Sorry": A Study of the Identity Implications and Restraints That Apologies Create For Their Recipients*, 13 CURRENT PSYCHOL. 10, 11 (1994) (documenting a number of positive social consequences that result from apologies); Donna L. Pavlick, *Apology and Mediation: The Horse and Carriage of the Twenty-First Century*, 18 OHIO ST. J. ON DISP. RESOL. 829, 844-47 (2003) (discussing the positive impact of apology on the dispute resolution process); see also, Barry R. Schlenker & Bruce W. Darby, *The Use of Apologies in Social Predicaments*, 44 SOC. PSYCHOL. Q. 271, 271-72 (1981) (discussing various forms of apologies in the contexts in which they are used).

jailed as a terrorist by the government for 27 years), he faced an enormous challenge of how to heal a nation of overwhelming prejudice on both sides of the color line. One of Mr. Mandela's bodyguards asked for more guards to ensure the new president's safety. After careful thought he gave him four – the same white guards that had guarded his white predecessor. The guard opposed this saying that *"not long ago they had tried to kill us."* Mr. Mandela responded, *"Reconciliation starts here. . . . Forgiveness starts here, too. . . . Forgiveness liberates the soul. It removes fear. That is why it's such a powerful weapon."*[57]

III. CAN INDIA EFFECTIVELY ACCOMMODATE MEDIATION?

With mediation dominating in America and spreading throughout the world as the primary means to resolution, can the Indian system accommodate it?

There is not only a framework for mediation in India, but there is a rich legacy. Alternative Dispute Resolution (ADR) methods are not new to India and have been in existence in some form since before the modern justice delivery system was introduced by the colonial British.[58] It now has a constitutional basis, Article 14 and 21, which

[57]*CHRISTIAN SCIENCE SENTINEL*, March 8, 2010, No 10, at 28.
The Amish church also gives us an example of forgiveness. When a member killed several little girls, the community rushed to the assailant's home and had a prayer session with this wife and family, an act of forgiveness.

[58]Since Vedic times, India has been a pioneer in providing speedy and effective justice through informal processes. Earlier, dispute settlement by Panchayats, a counsel of village elders, was an accepted method of conflict resolution. This led to the emergence of the celebrated Panchayati Raj System in India; *Sitanna* v. *Marivada Viranna*, A.I.R. 1934 PCIO (India), the Privy Council affirmed the decision of the Panchayat in a family dispute. Sir John Wallis, J. stated as follows *"Reference to a village Panchayat is the time-honored method of deciding disputes of this kind, and has these advantages, that it is comparatively easy for the*

deal with the Fundamental Rights of Equality before Law and Right to Life and Personal Liberty.[59]

In 1980, the Government of India set up a committee to implement legal aid under the chairmanship of former chief Justice of India, Mr. R.N. Bhaqwafi.[60] Later, Parliament enacted the Legal Services Authorities Act of 1987, which provided a mechanism for the speedy resolutions of disputes. Also, in 1984, the Family Courts Act was enacted to promote conciliation and speedy settlement of disputes relating to marriage and family affairs.

Within this framework, the question arises as to why mediation and conciliation have not had greater impact on the India legal system.

There may be several reasons:

A. Public Resistance to Change

As in America, there may be public resistance to change. For the most part the public will not know the difference between mediation and arbitration and many have probably heard of neither.[61] However,

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panchayatdars to ascertain the true facts, and that, as is this case, it avoids protracted litigation which, as observed by one of the witnesses, might have proved ruinous to the estate. Looking at the evidence as a whole, their Lordship see no reason for doubting that the award was a fair and honest settlement of a doubtful claim based both on legal and moral grounds, and are therefore of opinion that there is no grounds for interfering with it".

[59]In 1982, in Juragarh in the state of Gujarat, a forum for ADR was created for the first time in the form of Lok Adalat (People's Court). Lok Adalats helps parties to compromise and reach settlement which is binding on them. It has proven effective in settling money claims, partilition suits, damages, and matrimonial disputes. It provides a mechanism which permits parties to resolve their disputes expeditiously and without cost.

[60]The first major area where conciliation has proven successful is in labor law. The Industrial Disputes Act of 1947, statutorily recognized conciliation as a method of dispute resolution. The Act encourages workers and management to negotiate, or if that fails, to enter conciliation before resorting to litigation.

[61]There have been expressions of concern that mediation undermines the rights of women in family law disputes; *See*, Trina Grillo, *The Mediation Alternative Process, Dangers for Women*, 100 YALE L. J. 1545 (1991). Concern has even been expressed that the informality of ADR fosters racial and ethnic prejudices; See,

public resistance goes only as far as resistance by attorneys. If attorneys recommend parties engage in mediation, they will normally acquiesce.

As mediation took hold in America, the public began to see the benefits. They quickly recognized that it was considerably less expensive, was expeditious and was kinder on the parties themselves. They now see the practice of law as a noble profession. More important, they now demand mediation over the courtroom trial and use lawyers who will accommodate them. In other words, in America, mediation has won out in the marketplace.

a) Lawyer's Resistance to Change

Initial resistance to mediation in America came from the plaintiffs' bar. They felt insurance companies and big businesses were using the process to force an unwary public to accept settlements which were unfair or less than what a judge might do. What they learned was that the presence of a mediator often resulted in settlements which were better than what might occur in court. More important, a mediated settlement avoided the prospects of receiving nothing at trial.[62]

The plaintiff's bar acquiesced first, because attorneys realized a mediated settlement was much better for their clients. They weren't caught up in protracted litigation that cost more than anticipated, and they found the mediation process so much more comforting. Placing

Richard Delgado, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985); See also, Owen F. Fiss, *Against Settlement*, 93 YALE L. J. 1073 (1984); Erick Yamamuto, *ADR, Where Have the Critics Gone?*, 36 SANTA CLARA L. REV. 1055 (1996).

[62]In the past twenty years it has become more and more difficult in America to recover a substantial plaintiff verdict. The author has kept track of cases he did not settle as mediator, and forty percent of those cases came back with a defense verdict. And in each case there was a substantial offer made, only not enough to satisfy the plaintiff or counsel. Even more telling is that seventy percent of the cases tried resulted in a verdict which was $25,000 or less, including the zero verdicts. In America, you cannot try a case for $25,000, the costs are too great.

the interests of their clients first, it was far easier to accept the process.

On the defense side, the challenge was more real. There was great reluctance to suggest mediation or ADR because it could severely impact the economic well-being of the law firm. More than one major large firm in America has failed because of the decline in revenue caused by mediation. The pressure for change, therefore, came from the public and, in particular, industry. Insurance companies and large corporations began to recognize they could save substantial costs by staying out of the courts. They literally forced their attorneys to accept ADR with the threat they would deal elsewhere with attorneys who would. The public created a competitive market in which only those defense lawyers who were effective in mediation would survive.

b) Court Support of Mediation

At first, courts in America considered mediation of limited value, restricted to family disputes, neighbourhood differences, and possibly employment problems. No one envisioned the meteoric rise in the use of mediation in all areas of the law, from patent and commercial dealings to personal injury and small claims. The courts were quick to support mediation for it eased congestion in the courts.

American courts not only accepted mediation, but affirmatively promoted it. They encouraged parties to settle before a case was set for trial. They assisted in the process by holding settlement conferences, even assigning various judges and magistrates to mediate cases. Several appellate courts have also assigned mediators to work with the parties in an attempt to resolve the matter before hearing.[63]

[63]The federal First Circuit Court of Appeals, which mandates mediation in all civil cases on appeal. Federal Rules of Procedure and First Circuit Local Rules, r.33 (2012) www.cal.uscourts.gov/files/rules.pdf.

There can be no question as to the impact mediation is having in America. As noted above, there has been a 60 percent drop in actual cases tried since the mid-1980s.[64] Thus, mediation has been a major relief to an overburdened court system.

IV. HOW INDIA CAN MAKE MEDIATION THE MAINSTAY OF ITS COURT SYSTEM

It is here suggested that the Indian legal system has all the pieces already in place to make mediation flourish. It has a public that is already sensitive to peacemaking based on a culture that has utilized some form of mediation long predating even the founding of America.

Perhaps the place to begin is with the legal profession and courts. Training sessions might be held to train mediators and attorneys representing clients in mediation. The same effort might be made to train judges so that they might see how mediation can help them control their dockets.

At the appellate level, mediators might be appointed to address pending appeals. The appellate courts or Supreme Court might designate routine appeals for mediation. The mere fact a case has been pending on appeal for some time might encourage the parties to resolve it through mediation if given a chance, so they can get on with life.

Another avenue for spreading the word is to introduce mediation classes in the law schools. There are many such courses in American law schools that could be used as models. Professors are more than happy to share their material.

[64]Galanter, *supra* note 8, at 3.

To spread the word to the business community, lawyers could be designated to speak on mediation at trade association meetings and industry conferences. There is always great interest in how to make dispute resolution more efficient and economical.

Another way to educate the legal profession is to support mediation tournaments at the law school level. The National Law Institute University in Bhopal held the first All-India national mediation tournament to which thirty teams from around the nation attended. It was extremely well run, and a superb model for future tournaments. As Justice A.K. Patnaik of the India Supreme Court stated at the tournament, it is important for our students to become "solders for peace." It is a majestic calling, and mediator training in law schools will help our future lawyers be just that.

V. CONCLUSION

The author and five of his colleagues, H. Case Ellis, president of the International Academy of Dispute Resolution (Chicago, Illinois), Rahim Shamji (vice president of the Academy (London, England), Tom Valenti, secretary of the Academy (Chicago, Illinois), Meghann Sweeney, executive director of the Academy (Chicago, Illinois), and Deborah Queen (Beaumont, Texas), attended the First Annual All-India Law School Mediation Tournament. We were exceedingly impressed with the brilliance of the students and how quickly they understood and implemented the tools of mediation. With students like these, India's legal system is in good hands.