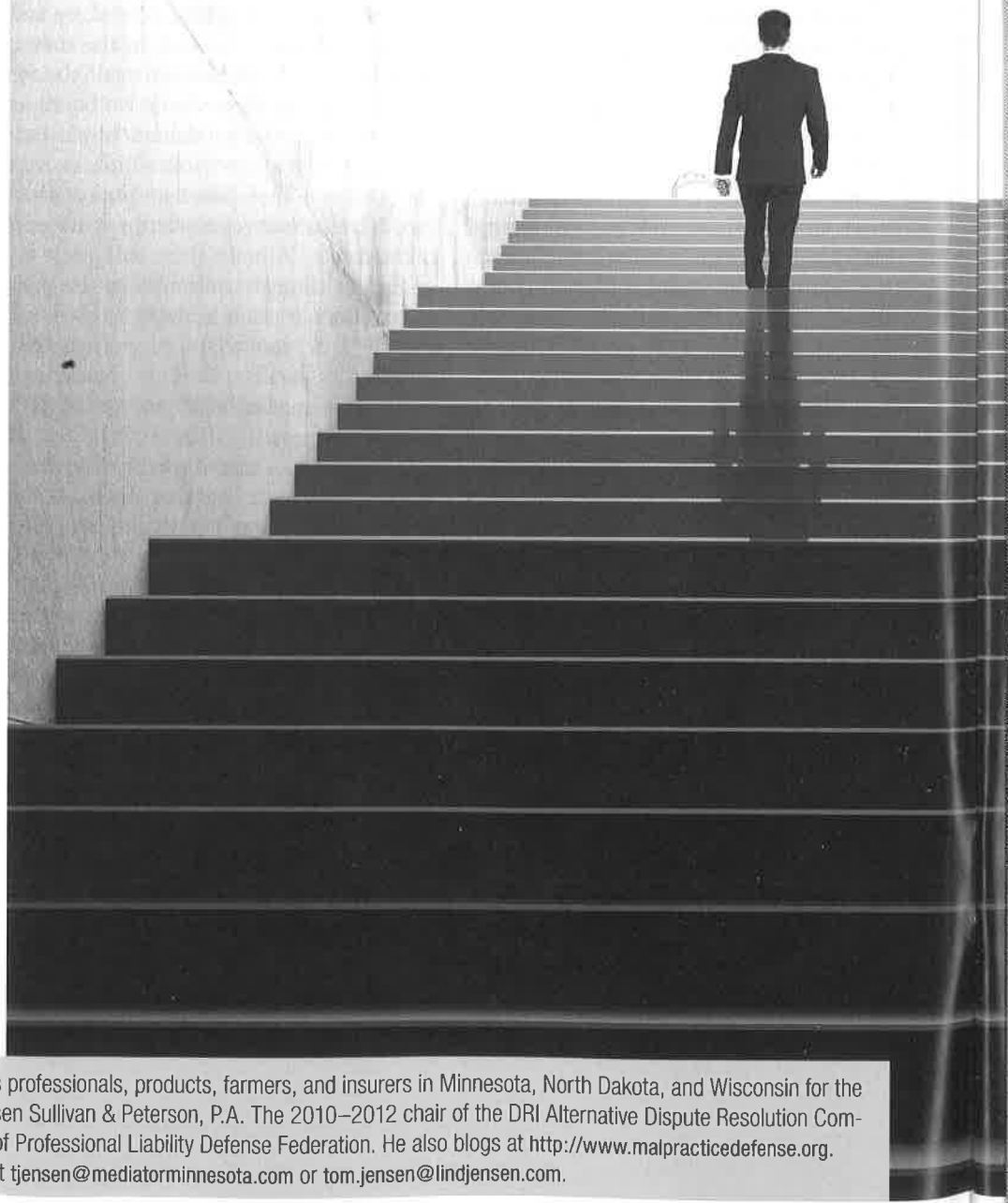
Accelerating in Neutral

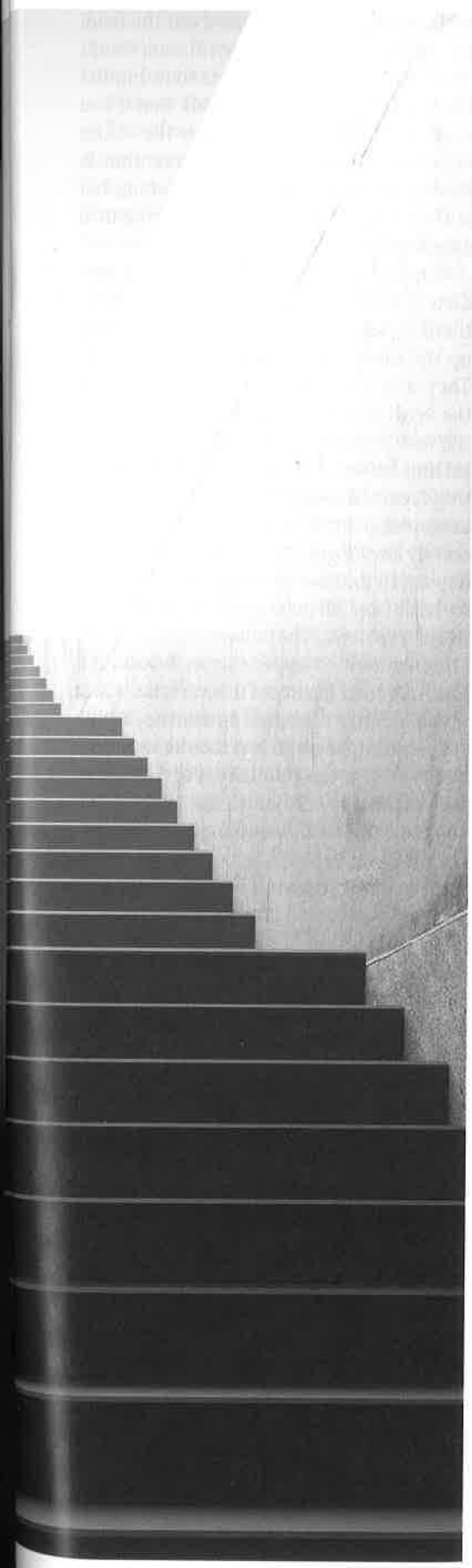
Building a Successful Mediation Practice

By Thomas D. Jensen

You must stand out to overcome the mediator market saturation. Here's how to do it.



■ Thomas D. Jensen defends professionals, products, farmers, and insurers in Minnesota, North Dakota, and Wisconsin for the Minneapolis firm of Lind Jensen Sullivan & Peterson, P.A. The 2010–2012 chair of the DRI Alternative Dispute Resolution Committee, he is the co-founder of Professional Liability Defense Federation. He also blogs at http://www.malpracticedefense.org. Mr. Jensen can be reached at tjensen@mediatorminnesota.com or tom.jensen@lindjensen.com.



The mediator market is flooded. Civil litigators with gray hair send you letters, indicating that they wish to do some mediation work. Judges retire from the bench with ties to sitting judges and the plaintiff and defense lawyers who appeared before them, and now they're mediators. Many mediator selections are inertia based in that neutrals are often chosen based upon the most recent experience with an established mediator. Many alternative dispute resolution (ADR) neutral panels established by industry groups require experience prerequisites that you may lack. Is there room for one more mediator in your state? Yes, but you need to market yourself innovatively, and outperform as a neutral, to break in.

Certainly, service as a mediator has several benefits. It's fun, and it's nice to know that you're trusted and thought to be fair, as well as to be chosen for those reasons. At this point, you pretty much have the law figured out, and you've experienced all manner of negotiation approaches. Mediation work typically brings higher hourly rates, and collections are rarely a problem. No malpractice risk is presented, and you have complete calendar, or some would say vacation, control. True, too, is that you'll learn law that you never knew or may have forgotten. But the pivot to ADR practice also brings some risks with it. Will your clients feel that you've lost the advocacy edge? Will they feel that you've gotten old, and they must establish succession plans for their work? Remember, in mediation practice you cannot enhance your production through associate hours; you're now the whole pyramid. *See* John R. Van Winkle, *Mediation: A Path Back for the Lost Lawyer* 6 (ABA 2d ed. 2005) (stating that the successful litigator leverages files by having associates bill hours to them). Have you positioned yourself for mediation field entry?

Mind Your Advocacy Reputation

Hopefully you have expressed your advocacy to plaintiffs' attorneys in a way that avoids the label "defense extremist." *See* Robert W. Hassold, Jr., *Establishing a Mediation Practice: Advice for Lawyers*, Dispute Resol. J. 31–32 (ABA Aug.–Oct. 2007) (noting that it is probably detrimental to have a reputation as a die-hard litigator who views trials as a better alternative to negotiations). Remember, plaintiffs' attorneys paid for your house. The claims of many plaintiffs are worthy. Join, or get elected to, "bi-partisan" law organizations such as the American Board of Trial Advocates (ABOTA), the American College, an Inn of Court, certified trial lawyer groups, and legal aid organizations. The reality is that most of your referrals will come from lawyers, not their clients. Most litigants will tend to defer to their attorneys regarding the choice of a suitable mediator. Jeffrey H. Goldfien & Jennifer K. Robbennolt, *What if Lawyers Have Their Way? An Empirical Assessment of Conflict Strategies and Attitudes Toward Mediation Styles,* 22 Ohio St. J. on Disp. Resol. 277, 285–86 (2007). Become a bar association leader. Attend some plaintiff association functions. Look for plaintiffs' claims that you can make that won't offend your insurer clients. Get involved in human rights organizations. The goal should be to begin working now to develop a mediation practice later in your career by doing 200–300 hours of work now as a neutral.

Getting Started

Consider taking some mediation classes. *See* Art Hinshaw, *Regulating Mediators*, 21 Harv. Negot. L. Rev. 163, 172–73 (Spring 2016) (noting that 40-hour mediation training programs are widely held across the country). Join a local dispute resolution association to add that line item to your bio and to learn from and connect with others. *See* Lawrence J. Boulle & Michael T. Colatrella, Jr., *Mediation Skills and Techniques* 320 (2008) (stating that building professional networks is the most important form of marketing a mediator can do because it can be the main source of client referrals). Become qualified or certified by your state to serve as a neutral if that process exists, and read good books on negotiation strat-

egies. Two are Roger Fisher, William Ury & Bruce Patton, *Getting to Yes: Negotiating Agreements Without Giving In* (2d ed. 1991) and William Ury, *Getting Past No: Negotiating With Difficult People* (2007).

Building Your Launch

Innovation is the best way to break through the overburden. The old ways of generating mediation work may not cut it. Those letters saying, "Hi, I'm now a mediator," which you get with nothing else, don't mean much. Merely placing your photograph in a law advertisement announcing your mediation practice is too passive. Volunteering as a community service mediator to get experience likely won't get you the personal injury and commercial litigation assignments that you want. Asking friendly judges for ADR assignments might help, but remember, they may prefer their retired friends from the bench. What you need is a website, a blog, and yes, a brochure.

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The benefit of a website, a blog, and a brochure is that they "separate" you a bit from your day job: defense litigator. Consider using crowdSPRING LLC or a similar service to create a logo for your mediation practice inexpensively. Consider GoDaddy or a similar service to build a simple website (part of a weekend's work will result in a five-page website for your mediation practice) with e-mail capability and blog capacity (WordPress is a source to consider). (The author has no interest in these firms.) Then make sure that your contact list for mediation marketing is up to date and extensive, and pay attention to your state's advertising and promotion ethics rules about the content of notices. Have your IT people sync your mediation website e-mail with your office e-mail so that you needn't check separate systems to see all messages readily.

You can also build your own brochure. Yes, they're old school, but they're still good to have in the caucus rooms for litigants to page through between your visits. Use Microsoft Publisher or a similar program to make a tri-fold brochure that will fit into a number 10 envelope. Dual-fold brochure paper is readily available in office supply stores. Coordinate the color scheme and font of your website with your brochure. Remember Branding 101: consistency in messaging is everything. Mail the brochure with your "Hi I'm now a mediator" letter to your contacts list.

Retired Judges Have Nothing on You

When the subject comes up in mediator selection conversations, push back on the idea that retired judges in general are better at mediation. The opposite may be true. Judges in many states spend most of their careers processing criminal defendants and marriage dissolutions. You've spent 100 percent of your time fighting over money. Judges don't negotiate anything. They issue edicts by fiat. Don't forget that interpreting law (a judge's job) mostly has nothing to do with mediation negotiations. Let's face it. The last segment of a mediation session is analogous to a brawl. How long have judges functioned down at the level of posturing, pushing and shoving to get deals done? Not much.

The reality is that neutral work requires advocacy in pushing the sides to move. Judges' advocacy skills may have softened in service as an adjudicator. Welcome their return to capitalism, but now it is time to compete. You can. Be ready to sell your advocacy experience as an asset in neutral service.

Become the Verdict Reporter

Look into how you can research civil jury verdicts in your jurisdiction. Consider sending to your contacts list a monthly summary of civil verdicts in your jurisdiction. Trial lawyers never auto-delete gossip about verdicts. Then at the end of the message, include a short ADR-related case summary or some other ADR-related news to show everyone that you're in tune with the latest information about the field. Of course, ask for some mediation work. The beauty of this exercise is that, implicitly, it will cause people to think that if you know all the verdicts, you know the values of cases in your state. (Of course, that is fantasy because every case is different, but still the process adds value to your neutral assignments candidacy.)

Consider ordering copies of all the verdicts from the court administrators. Place them in big three-ring binders, dividing up the cases according to their case type. They allow the parties to page through the verdicts and see in the handwriting of the jury foreperson or leader the plaintiff getting zeroed-out, or the defendant getting creamed. Verdict forms show real-life examples of trial outcomes. They are not merely lawyer guesswork about what might happen in the case in mediation. The need-to-settle implicit messaging shines through in such reviews. They create a motivation: "I don't want to appear in that book if I lose." Another beauty of this exercise is that if you identify the winning attorney in the e-mail summary, and you should, the attorney will love the publicity. Plus doing so will encourage verdict-getters to send you copies of their wins, making your verdict-search job easier.

Even better, use your verdict data to create the "[Your State] Jury Verdict Reporter" and put it up on your law firm's website. Your clients will appreciate that your firm knows how to value cases in your jurisdiction. Monthly reporting of jury verdict data will outdo the commercial verdict reporter sources and will set you apart from the mediator crowd.

Freebies Rule

Yes, there is such a thing as a free lunch. Provide it. Lunch for the disputants during a mediation is the cheapest marketing expense that your managing partner will approve. Pass out the lunch delivery service menus at 11:00 a.m. The brought-in lunch keeps the parties in their caucus rooms and does not disrupt the process.

If your office is downtown, try to provide free parking. Disclose your free wi-fi passcode. Include in your mediation agreement a term that offers free, post-session aftercare in which you continue to seek a settlement at no cost, even if you must convene

a second in-person session. You'll make up the loss in new referrals. Consider free travel time to work throughout your state.

State in the mediation agreement that if either side is disappointed with your mediation preparation, legal acumen, or something else, you will not send an invoice. Though it is unlikely that it will be used, it has some appeal to the parties and will keep you working hard throughout the session.

The lawyers, clients, and adjusters will prefer coming to your office for mediations for the free lunch and other benefits.

Session Conduct

Mediation typically involves several overlapping stages: introduction of the process by the mediator; presentation of viewpoints by each of the parties; expression of emotions by the parties; caucusing to discuss confidential information and views about settlement alternatives; joint exploration of alternative resolutions; and forging an agreement, when possible. The mediator's major challenge in moving through these stages is to assist the parties, who are initially distrustful and locked emotionally in conflicting positions, to reduce their antagonism and consider alternative possibilities for settlement. Sarah R. Cole, *et al.*, *Mediation: Law, Policy & Practice* §3:2 (2010).

Ask the parties in advance if they wish to have an initial joint session. If it is carefully controlled, a joint session can have value. Adjusters often don't meet claimants. Many times, though, it can help an adjuster pay a claimant if they meet and interact a bit. Perhaps the joint session is just a meet and greet, or perhaps each side will present a short, non-bombastic summary of their claim views. The lawyers will be good gauges of whether a joint meeting initially, or immediate separate caucusing, is the best approach for the case in question.

Be cognizant of the importance of avoiding laughter that can be heard outside the caucus rooms. This can be hard because chances are that you know the advocates well, and it is natural for light-heartedness to appear in the course of negotiations. The problem is that the parties cannot be sure of the basis for the laughter. Does it mean that the mediator really has a party preference? Are they laughing at the claimant? Keep all communications behind closed doors, especially in serious injury or death cases. Nancy F. Atlas, *et al.*, *Alternative Dispute Resolution: The Litigator's Handbook* 183, 187 (ABA 2000) (adding that laughter may suggest you are not taking the matter seriously). On the other hand, humor may be appropriate in the claimant's caucus room when necessary to reduce stress, anxiety, or tension. Kevin W. Cruthirds, *The Impact of Humor on Mediation*, Dispute Resol. J. 35 (Aug.–Oct. 2006).

Always emphasize to both sides the benefits of mediation: privacy, flexibility, efficiency, control, better results, voluntary outcomes, avoidance of precedent, preservation of relationships, creative remedy options, and a neutral with specialized knowledge (unlike juries). Jay E. Grenig, *Alternative Dispute Resolution* §1:2 (3d ed. 2005).

At-Session Marketing

Commercials never end. Nor should yours. Place your bio, the mediation agreement, and business cards on the caucus room tables. (The mediation agreement should provide for mediation confidentiality, your fee, the obligation to negotiate in good faith, and other state-specific terms.) Encourage staff to be attentive. Let your colleagues know who is coming in so that they can welcome the mediation participants during breaks.

Prepare a summary short-form agreement for settlement with blanks about who will pay whom and how much. Add an "Other Key Terms" heading with lines to fill in. The short form will include a statement that the full release will follow. Tell the participants at the outset that all they have to do is fill in the blanks. Include a provision in the mediation agreement that if a dispute arises about the final terms of the formal release, that you will be the sole arbiter of the dispute. That way the court expense is avoided in a motion to confirm or to set aside an agreement. Having the short-form settlement agreement in your word-processing system is great because it makes it easier to conclude a matter at the end of the day when everyone is spent and your staff is gone.

You need signatures on the short-form agreement before anyone leaves your office. Buyer's remorse is a powerful evil to avoid. Find out who the judge is who is assigned to the case. Place a draft letter to the judge on the caucus tables, which announces the settlement of the dispute. (That also provides an implicit message to encourage settlement, and notifying the judges may—who knows—get you some court-directed business as mediator or special master.)

All of these elements—the caucus table papers, the welcoming environment, the ready-to-use forms—market your brand as capable, ready and results-driven.

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In my August 2009 *For The Defense* article, "*Making the Case for Directive Mediation,*" I include in the box inserts accompanying the article funny—and serious—content for memoranda that you should also place on the caucus room tables. The memoranda include "Perils of Overconfidence," "Quotes of the Day," "Are You Ready for Trial Considerations?," and "Costs of Trial and Appeal." The "perils" memorandum references humorous examples of historic figures who were certain that they would win in various contexts—

and they lost. The "quotes" memorandum includes sarcastic remarks of comedians and others who take issue with the idea of entrusting lay jurors with vital commercial information. The "costs" memorandum lays out all the costs that the parties may anticipate if they do not settle the case, including at the end, the costs of a retrial after an appeal! (Meaning that the parties start all over again.) The "prepared" memorandum lays out many things that can go wrong at trial, notwithstanding dutiful efforts to avoid mistakes, poor performances, and the assorted miseries that can accompany trial day unanticipated consequences. It is legitimate to emphasize the high financial and psychological costs of litigation as negotiation tools. Grenig, *supra,* at §5:22. Look at the parties (the lawyers may not encourage the reviews) and tell them to review the memoranda. Contact me if you wish to have these memoranda in Microsoft Word format and adapt them for your own use. I want them to help you monetize your efforts as a budding mediator.

The mediator must not favor one side over the other, nor should the mediator hope that one side will "win" the negotiation. But otherwise, the mediator should push the plaintiff to reduce demands and the defendant to increase offers.

Tackle the Minutiae Early

To head off the session-end misery when tempers may flare and energy is at low ebb, deal with the various claim-detail nuisances at the start of the session. Settlements can be derailed after agreement to a money term is reached, but then other more minor buzz-kill details emerge that threaten the outcome.

Demand lien and collateral source information up front. Find out if Medicare or Medicaid is in play. Will a deal require confidentiality or non-disparagement terms? How many days are allowed for receipt of the check? Is a structure in play and if so are there disputes about the choice of the broker? Are potentially related claims (*e.g.*, consortium, survival, subrogation) lurking in the background that are not pleaded in the complaint? Ask for these things in the confidential mediation statement that you will ask the parties to provide you two days before the session. Deal with these issues early so that the only disputed issue near the end of the session is the money or another consideration issue. Last-minute, unanticipated details have thwarted many mediated settlements.

Negotiation Preparation

Should the mediator be neutral? Yes, but.... Certainly, the mediator must treat each side equally. The mediator must not favor one side over the other, nor should the mediator hope that one side will "win" the negotiation. But otherwise, the mediator should push the plaintiff to reduce demands and the defendant to increase offers. The best way to do that is to appear non-neutral by challenging each side's positions. The parties must be informed at the outset that the mediator's challenges to their positions may appear to reflect bias. By providing assurance to each party that the same types of challenges will be leveled against the other party in an overall neutral fashion, generally they understand. *See* James A. Wall, Jr. & Suzanne Chan-Serafin, *Friendly Persuasion in Civil Case Mediations*, Conflict Resol. Q. 285 (2013) (commenting that research shows that assertive mediators can attain agreements without irking the disputants).

The key is to prepare before the session a list of advocacy points to use against the plaintiff, and a list to be used against the defendant. Each time that you enter the caucus room, express two or three reasons why the party in the room should move from the last position. Several entrances, with several new challenge points, reflect your hard work and ingenuity in articulating the importance of adjusting positions. This is important because often caucus sessions pick up where the discussion was left off. The same points are rehashed. It becomes dull. Pull out new reasons why the claims and the defenses are valid or invalid. It is not always the case that the parties' counsel know all the law that applies to the case. The mention of new cases or statutes, or new claims or defenses, stirs the pot. Let your new material sink in between caucus sessions.

Bonding

Among the most important elements of successful mediation is for the mediator to develop a bond, or at least a sense of trust, with the claimant. This is particularly true with the defense lawyer as mediator. Assure the claimant that while you come from a defense background, you will not be the second defense lawyer at the mediation. Add that you want to succeed as a mediator, and if you worked to prefer the defense, your mediation career will be short lived. Tout the fact that you know how insurance companies think and what moves them. Admit that while there are several insurer practices that you like, there are also several that you dislike. Then spend time getting to know the claimant. Listen attentively. Be serious, but offer light-heartedness when you can. The first impression rule is true. Create an aura of trust that you'll need when the going gets tough at the end.

Bonding efforts are also important with an adjuster, but less time needs to be spent. Adjusters are professional negotiators who know the mediation process, and the personal charm of the mediator may not be essential currency in an adjuster's mind in terms of your worth.

Gap-Closing Strategies

Be prepared to offer new negotiation approaches as the day wears on. Some mediations may result in success merely after the exchange of successive offers and demands, which culminate in an agreement. But often that breaks down as the parties start to match move for move and the gap insufficiently shrinks. Something must be done to alter the money-zone status. Consider these approaches.

- **Bracketing.** This involves a conditional offer and response: "I will demand $X, if defendant offers $Y," or "I will offer

$X, if plaintiff demands $Y." The party accepts or counters with a different bracket. Bracketing signals positions and saves time. Parties generally assume that a case will settle at the midpoint, but that is not always true. Bracketing generally occurs later in the session.

- **The conditional offer.** This approach tests the waters without conceding a firm offer: "If [plaintiff/defendant] will [take/pay] $X, will you do it?"
- **Blind bidding.** In blind bidding, each side provides the mediator with a final demand or offer, depending on the party's position; the parties agree that if the gap is <$X, they will split the difference, but if they are up to $Y apart, they will keep negotiating, and if they are >$Z apart, the session ends.
- **Double blind mediation.** This approach is best used in multiparty contexts. The mediator receives the plaintiff's demand and discloses it to the defendants. The mediator secures a confidential contribution from each defendant. The mediator discloses the total defense sum to the plaintiff and receives a new demand. Only the gap is revealed to the defendants. The mediator seeks additional sums from the defendants separately. If successful, the plaintiff doesn't learn who paid what. Defendants don't learn the total settlement sum.
- **Baseball mediation.** In baseball mediation, each side provides the mediator with a final demand or offer; mediator chooses one.
- **Propose atypical consideration.** Sometimes money can be mixed with other consideration successfully. Suggest structured or installment payments, a future business arrangement, payment in kind versus dollars, substitution of goods, an apology, contract reformation going forward, settle what is solved and send the remaining dispute to arbitration, or a payment to charity.
- **Meet separately with counsel only.** Because the party may be suspicious of this idea, it is best to do it when the party's lawyer is outside the caucus room. These discussions aid in identifying settlement obstacles that can best be articulated between counsel only.
- **Split the difference proposal.** A final effort to bridge the gap.
- **Settlement by less than all parties.** Of course you want a global deal, but take what you can get.
- **The last and final plea.** The last ditch effort, just above begging.
- **High-low agreement for trial.** At least you've successfully negotiated something!
- **Throw in your fee.** Offer your fee to close the gap. Pity may break the logjam. Risky: they may take it.
- **Mediator's proposal.** In this situation, the mediator writes a settlement figure on papers along with other key points. The papers are given to the parties. The parties write "yes" or "no" on the paper and return it confidentially to the mediator. If both are marked "yes," settlement is announced. If not, the "yes" party learns that the "no" party won't pay or accept the mediator's number.

An additional comment about the "mediator's proposal" strategy: Mediators disagree on whether legal or value evaluation by the mediator is appropriate. Cole, *supra*, at §3:4, n. 8 (2010) (citing authorities). Many mediators shy away from giving advisory opinions or recommendations. Stephen P. Younger, *Effective Representation of Corporate Clients in Mediation,* 59 Albany L. Rev. 951, 958 (1996). Others recommend that the mediator propose a settlement package, to be used at impasse, and presented as a "what if" or "mediator's proposal" to all parties simultaneously. Dwight Golann, *Mediating Legal Disputes* §2.1.6 (1996).

Reflect Optimism and Settlement Certainty

Maintain a positive "can-do" image throughout the sessions, even in the face of objections, obstacles, venting, tirades, posturing, sandbagging, and other emotional blockages to resolution. Welcome catharsis. Shift to small talk to defuse anger or emotionalism. Always resist the sense of hopelessness as options reduce. Emphasize the value of the need to move on. Recognize that even if the matter is not settled by the mediation, it is a well-documented fact that an ADR procedure that does not yield a settlement at the time nevertheless often causes a settlement to occur later on. Daure, *supra,* at §3.02. Mail thank you notes to counsel after the session that expresses gratitude for the opportunity to serve.

Billing

You are just starting out as a budding mediator. Go easy on the pre-session preparation billing. If the case does not settle, consider only billing for the session time. If the case settles, bill less for the time spent in preparation. Be vigilant to ensure that staff does not add the lunch to the costs portion of the invoice. Bill for all your preparation time once you're established.

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Conclusion

The Alternative Dispute Resolution Committee should be DRI's number 1 committee. Mediation and arbitration advocacy and negotiation skills are essential to today's litigator's success. Join the committee and participate in its programming as another element of your development as a new mediator. Manage your reputation over time, build your network among the lawyers in your state, and be innovative in the marketing of the ADR element of your practice.

You must stand out to overcome the mediator market saturation. It takes time, so be persistent, optimistic and patient. You'll learn law, case values, and negotiation skills that will also aid your advocacy practice. See you at the DRI Annual Meeting's Alternative Dispute Resolution Committee gatherings, where we can share ideas and catch up! FD