FORMER CHIEF JUSTICE WARREN E. BURGER’S DISPARAGEMENT OF THE AMERICAN JUDICIAL SYSTEM AND SPONSORSHIP OF MEDIATION

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I.

INTRODUCTION

Most American lawyers take great pride in the American judicial system, which has stood the test of time for over 200 years. In spite of the pride we have, former Chief Justice Warren E. Burger of United States Supreme Court launched a frontal attack on the very foundation of that system and the lawyers who thrive in it. In his 1984 Annual Report on the State of the Judiciary, he castigated the court system in these words: “Our system has become too costly, too painful, too destructive, too efficient for a truly civilized people.” And to the lawyers who thrive in it, he spoke these sharp words: "The entire legal profession, lawyers, judges, and law professors, has become so mesmerized with the stimulus of the courtroom contest that we tend to forget that we ought to be healers of conflict.”

A close examination of Chief Justice Burger’s pronouncements makes clear that his attack was not just against the inefficiencies of American courts, but their very underpinnings, the adversarial system itself. To that end, he championed a new approach to resolution; he advocated for mediation.

1 The system gives all citizens access to the courts, and in federal courts, trial by jury is constitutionally protected. The Seventh Amendment to the U.S. Constitution provides:

In suits at common law, where the value in controversy shall exceed $20, the right to trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in a court of the United States, then according to the rules of common law.


3 Ibid.
This article examines, first, Chief Justice Burger’s attack on the court system; second, his attack on the adversarial process itself; and third, his attempt to introduce mediation.

II. CHIEF JUSTICE BURGER’S ATTACK ON THE AMERICAN COURT SYSTEM

Chief Justice Burger’s attack on our court system was two-pronged: one, its inefficiencies; and, two, its destructive nature.

A. Inefficiencies of the Courtroom Trial

Chief Justice Burger first observed what he considered to be gross inefficiencies in the courtroom trial. For starters, he noted that civil trials are "too costly" and "too lengthy" to provide real justice. The record would suggest there is some validity to the charge. Many citizens today cannot afford to use the courts because of the costs incurred. One federal judge observed:

While we have created the fairest system in the world for resolving civil disputes, it is so expensive that very few people in America can afford to use it. The court system serves the rich, those with insurance and those who shift the cost of litigation to the rich and those with insurance. I cannot personally afford to use the system that I treasure.

Lawyers today are pricing themselves out of the market. Some trial lawyers are charging over $1000 per hour and associates over $500 per hour. It has become commonplace for major litigation to cost in the millions of dollars. One case incurred $80 million in pretrial discovery and trial. In this area


5 John A. Jarvey, United States District Judge, Southern District of Iowa, September 8, 2010 (letter on file).


7 In one class action, a major corporation spent a reported $80 million in pretrial discovery. During the scheduled nine-month trial, the corporation was spending $5 million per week supporting 20 lawyers and 30 support staff. The case settled after three months of trial. See, Combs v. Microsoft Corp., 646 N.W.2d 440 (Iowa 2002); 696 N.W.2d 318 (Iowa 2005); 709 N.W.2d 114 (Iowa 2006). Class actions were brought against Microsoft in other states as well as by the federal government and states attorneys general. See, United States v. Microsoft Corp., 84 F.Supp.2d 9 (DDC 1994), 80 7 F.Supp.2d 30, aff’d in part, reversed in part, 253 F.3d 34 (D.C. Cir. 2001), on remand,
only the rich and those who can shift the burden to the rich can survive. Litigation costs can threaten the very existence of the small corporation or business entity.

Similarly, the complaint that the court process takes too long has merit even today. In the 1980s and 1990s, it was not uncommon for cases to languish in the courts for 5, 10, and even 20 years. The sheer volume of cases filed each year, over 18 million, brought some court systems, particularly in industrialized areas of the nation, to virtual gridlock. Liberalized discovery, introduction of novel causes of action, the promulgation of new statutory and regulatory claims, the backlog of criminal cases, particularly drug-related, which further delayed civil trials, all added to the mix.

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8 Case Study: In one case, a medium-sized manufacturer sued an international conglomerate for tortious interference with contractual rights. The latter induced distributors of the former to breach their agreements and contract with it. It sought $8 million in damages. The conglomerate counterclaimed for alleged violations of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and sought $150 million in damages for conspiracy to boycott it from the market. The magnitude of the counterclaim, one half billion dollars (under the trust laws damages are trebled ($450 million) and attorneys fees and costs are awarded ($50 million) threatened the very existence of the plaintiff. There was no question that if the conglomerate won at trial, plaintiff could not survive. What started out as a simple tortious interference claim became a struggle for survival. The case, however, was settled through mediation with no money exchanging hands. See, Richard M. Calkins, The ADR Revolution, 6 RUTGERS CONFL. RESOL. J. 2 (Fall/Spring 2006).

9 See, O.C. Hamilton, Jr. and Shelby Sharpe, Discovery Rule Proposals – Two Different Philosophies, 15 REV. LITIG. 341, 343 (1996) (noting “that escalating costs of litigation and discovery was a factor considered by the State Bar of Texas Court Rules Committee when it proposed changes to the Texas discovery rules); Daniel A. Fulco, Note, Delaware’s Response To Inefficient Costly Court Systems and a Compromise to Federal Reform, 20 DEL. J. CORP. L. 937, 939 (1995) (asserting that “[t]he extreme costs of litigation is largely due to the discovery process”).


11 Chief Justice Burger stated:
The Chief Justice recognized that the individual and small business concern, answering an ever-increasing array of legal claims and responding to extended pretrial discovery, could no longer withstand the onslaught the system impose.\textsuperscript{14}

However, of greatest concern to the Chief Justice was the destructive nature of the system itself – it is "too painful, too destructive," for civilized people. And the Chief Justice was not alone in this observation. Former Judge Learned Hand of United States Court of Appeals for the Second Circuit observed: "I must say that as a litigant I should dread a lawsuit beyond almost anything in life short of sickness and death."\textsuperscript{15} And Associate Justice Antonin Scalia of the United States Supreme Court added, that Americans "are too ready to seek vindication or vengeance through adversarial proceedings rather than peace through mediation."\textsuperscript{16}

One reason our courts have become 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.


\textsuperscript{12} The Civil Rights Act of 1964 generated literally thousands of new cases filed each year.

\textsuperscript{13} \textit{See}, Keith C. Owens, \textit{Comment: California's "Three Strikes" Debacle: A Volatile Mixture of Fear, Vengeance and Demagoguery Will Unravel the Criminal Justice System and Bring California to its Knees}, 20 S.W.U.L. REV. 129, 151 (1995) (noting that many predict California courts, "will come to a standstill because of the increased caseload due to the three strikes rule").

\textsuperscript{14} \textit{Case Study}: A father and son distributorship was sued by its manufacturer to terminate its franchise. The distributor counterclaimed for violation of § 1 of the Sherman Act. Ten years of litigation ensued without resolution. The distributorship put all its profits into the litigation and went heavily into debt. With another two years of litigation looming on the horizon and $300,000 already spent in litigation, it gave up and pleaded with the manufacturer to mediate. The latter agreed if the distributorship paid all costs of mediation. Although the distributorship had a good counterclaim, it settled for $150,000 and went out of business. The inability to resolve the dispute in a reasonable period of time and at a reasonable cost, left the distributorship at the mercy of its manufacturer.

\textsuperscript{15} Learned Hand, \textit{The Deficiencies of Trials to Reach the Heart of the Matter}, (Nov. 17, 1921), in 3 Assoc. of the Bar of the City of New York, Lectures on Legal Topics 89, 105 (1926).

\textsuperscript{16} Antonin Scalia, \textit{Teaching About the Law}, CHRISTIAN LEGAL SOC. Q. (Fall 1987) at 6, 8. The author has witnessed two fatal heart attacks and one suicide directly related to litigation.
For all the above reasons, the Chief Justice found necessity for change.

B. Mediation: The Elixir of Change

In medieval times, disputes were resolved in the King’s court by battle and blood. As man entered the modern age, disputes were transferred to the more civilized courtroom; however, although there was no longer the clanging of lances against armor, the battle was just as intense. Recognizing this, the Chief Justice admonished the profession to make a second major transfer from the courtroom to, what he considered to be, the more civilized conference table. He advocated for mediation at a time when most lawyers did not know the difference between mediation and arbitration. In doing so, he redefined the lawyer’s ethical responsibility to the client and the meaning of "justice." He said:

To fulfill our traditional obligation means that we should provide mechanisms that can produce 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. 17

Indeed, he mirrored the words of another great lawyer, Abraham Lincoln, who said in 1850:

Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser – in fees expenses and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough. 18

Mediation meets each criteria outlined by Chief Justice Burger and Attorney Lincoln. First, the parties reach an acceptable result because they voluntarily agreed to it in their best interest.

Second, the costs of mediation are diminimus compared to litigation. There are no mediations costing $1 million or even $100,000. Indeed, a case costing $100,000 to litigate may cost only a few thousand dollars to mediate.

Third, there need be no long delays to reach resolution in mediation. Discovery does not have to be completed with depositions taken of all witnesses to lock in their testimony. The case can be


mediated even before it is filed. More important, the parties control how long it will take and not the courts. They decide whether to settle immediately or transfer it back to the courts.

Fourth, most mediators consider themselves peacemakers and at least attempt to keep the process low-key and user friendly. Many seek more than just resolution; they seek conciliation, peace and even healing.

So confident was Chief Justice Burger that the profession would take up the staff of mediation that his prognosis was that resort to the courtroom would in time become archaic, a last resort, when all else fails. He said, "For many claims, trial by adversarial contest must go the way of ancient trial by battle and blood..." And, indeed, the prognosis is coming to pass: mediation is winning out in the marketplace over the courtroom trial.

C. The Dispute Resolution Market Place

Professor Marc Galanter in his survey of the decline in cases terminated by trial in American courts, noted the 60% decline in absolute number of cases tried in federal courts from the mid-1980s to 2002, despite the increase in filings of 40% during the same period. More startling is the fact that less cases were tried in 2002 (4,569) then in 1962 (some 5,802), although five times more cases were filed in 2002. And the decline in state courts is even more precipitous. One federal magistrate stated: "Civil trials in the federal courts are disappearing. That is a statistical fact. Most cases the previously were tried now are settled, many with the aid of mediation." One federal judge observed: "There is now a dispute resolution marketplace and mediation seems to be prevailing in that market."


21 Paul Zoss, United States District Court Magistrate for the Northern District of Iowa, letter on file August 23, 2010.

22 John A. Jarvey, United States District Judge for the Southern District of Iowa, September 8, 2010 (letter on file). Judge Jarvey further stated:
III.

CHIEF JUSTICE BURGER’S ATTACK ON THE ADVERSARIAL SYSTEM

Perhaps more challenging than his attack on the court system was his frontal attack on its underpinnings, the adversarial system itself, the very foundation of civil justice in America. As noted, he declared that it was the "adversarial contest" that would go the way of ancient trial by "battle and blood." And, it was this "contest" that "mesmerized" and "stimulated" the profession to distraction, so much so that it had lost sight of its real mission to be "healers-not the cause-of conflict."

This attack on the adversarial system was radical when made and resulted in great umbrage being heaped upon the Chief Justice, and, thirty years later is still considered extreme. Therefore, it deserves close scrutiny. This section examines the points the Chief Justice made in discounting the adversarial system in civil disputes. He contended, (A) the system is geared to a win/loss dichotomy - someone must be defeated for it to work; (B) the adversarial system is handcuffed as to the relief it can provide; (C) the system is fixed, static, and inflexible and permits no deviation or creativity; (D) trial in the courtroom is all out war; (E) lawyers are required to make life decisions for their clients; (F) the adversarial system facilitates parties to engage in vindictive conduct; (F) the adversarial system negatively impacts on the lawyers participating in it.

A. The Foundation of the Adversarial System is the Win/Loss Dichotomy

The fundamental premise of the adversarial system is that there cannot be resolution unless someone is defeated. All tools of the advocate are geared to this end – cross-examination, impeachment, discrediting, undermining, defeating. It is use of these tools which make the process so

"Mediation took Iowa by storm for several reasons. First while courts are loathe to sponsor settlement conferences until the eve of trial, mediation is now conducted earlier and often prior to filing. Second, the process typically takes 4 to 6 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 less expensive."
painful and destructive to all who participate in it, party and attorney alike. And it is these tools with which the profession is identified and held in such disdain.

So many times the system cannot even achieve its goal of declaring a winner. All can lose in litigation. As Abraham Lincoln stated, as noted above, "the nominal winner is often the real loser – in fees, expenses and waste of time."

Chief Justice Burger disdained the win/loss dichotomy of the courtroom, and the lawyer’s role in it, its avenue to resolution. He felt lawyers could do much better than be mere victors in the adversarial skirmish. He courageously admonished lawyers that they use their talents and genius, their creative juices, to find resolution both parties could accept. He stated that 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, and peacemakers, the healers – not the promoters – of conflict.23

Chief Justice Burger espoused the fundamental principle of mediation that there can be no losers, only winners. There is no dichotomy. The concept of "loser" is an anathema to the process. The words "defeat" and "loser" are not in its lexicon. Unless all concern our winners there can be no resolution.

Because mediation can succeed only when there is a win/win resolution, the tools of the mediator and lawyers participating therein are quite the opposite of the advocate. They seek to build rapport and trust between the parties, not defeat one. They seek common ground between them, not impeach or discredit either. They seek to bind the wounds not deepen them. Most important, the lawyers’ intellect, energy and talent are on the highest, not the lowest, plane to bring healing not hurt.

In this setting, lawyers work together for common ground and not battle for single gain. When all is said and done, the public now sees the lawyer as engaged in a noble profession.

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B. The Adversarial System is Handcuffed as to the Relief it Can Provide

Another weakness to the adversarial system is that a court of law is handcuffed as to the relief it can provide – a dollar award. The judge and jury cannot ask, are there other considerations that might be weighed to conclude the matter. On the other hand, the mediator can ask this question and should ask it. And they are admonished by Chief Justice Burger to ask it, for their role requires they be "problem-solvers."

Unlike the judge and jury in the adversarial system, the mediator is given free reign to innovate and create, to craft a resolution the parties can accept. He or she can include in a settlement matters unrelated to the dispute itself if the parties find need and agree. The mediator and parties are not shackled with the win/loss strictures of the courtroom. They can include in the settlement an apology, a letter of commendation or recommendation, name a conference room after a deceased party, spread out defendant’s payments over a period of months or years, provide sexual abuse and safe touch training for church members victimized by pedophile clerics. The possibilities are unlimited.

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24 Case Study: Decedent was fired from his employment after 28 years of faithful service. He was the chief accountant, and when the company was purchased, new owners had a computer system installed. Unable to adjust to the system, two young women were hired at lower salaries to run the department. He sued for age discrimination under Title VII of the Civil Rights Act of 1964. Six months later, he died of other causes. His widow, who represented the estate, felt that he died from a broken heart.

At the mediation, she demanded $200,000 and the company offered $50,000. At the end of the day, she lowered her demand to $125,000 and the company offered $100,000 and neither would move further. With what looked like a failed mediation, the mediator asked if an apology would help. She answered in the affirmative and added that it would also help if the new owners would take sensitivity training so that they would not treat other employees the same way. The new owners readily agreed and the case settled for $100,000. As it turned out she would have settled for even less for her real goal was recognition of the fine work her husband had done.

25 Case Study: Plaintiff, who on occasion had epileptic seizures, worked at a bank. The bank was aware of her condition but accommodated her for it. At a company picnic she had a seizure, which frightened many in attendance. She was later released from employment and she sued under the Americans with Disability Act. She made unreasonable demands for settlement. During the course of the mediation, the mediator asked her what she really wanted. She explained she wanted a letter of recommendation so that she could show her friends and fellow employees that she was just as competent and professional as anyone else working at the bank. With the bank agreeing to this condition, the matter quickly settled to the satisfaction of both parties.

26 Case Study: Defendants, husband and wife, lived in a large home in a wealthy part of the city. They hired plaintiff contractor to make changes in their home for which they agreed to pay $65,000. Because of alleged add-
C. The Adversarial System is Fixed, Static, and Inflexible

Another major difficulty Chief Justice Burger had with adversarial system is that it is fixed, static and inflexible. There is no room for accommodation or modification. Parties and counsel must endure strict rules of evidence and procedure, and follow certain protocol. They are straitjacketed, and any deviation on their part invites error and even sanctions.

Mediation, on the other hand, has no such bounds; quite the opposite. The Chief Justice admonished lawyers to be creative, to be "legal architects and engineers." The genius of mediation is that it is by contract: the parties can agree to engineer any format they wish, even craft new ones to meet the exigencies of the particular case. They can change the format in midstream and utilize something quite different if there is need.

ons and travel and hotel expenses, the contractor added an additional $25,000 to the bill. Although defendants could easily afford to pay the additional $25,000, they decided to stand for principle and not pay anything over the contract amounts. They paid $50,000 and held back $15,000.

Plaintiff then sued to recover $40,000, and mediation ensued. During the course of the mediation, defendants agreed to pay only $15,000 more. This was rejected. Then defendant wife proposed a unique solution. She explained that plaintiff had done excellent work in their home. She was willing to recommend him to her friends. Defendant would agree to pay $15,000 cash up front and then over a two-year period refer plaintiff to her friends generating an additional $25,000 in business. If this target was not met, defendants would then pay the difference. The case was settled.

Case Study: In a cleric sexual abuse case, 13 victims requested more than money. They asked the church to provide a safe environment for children both at school and in church. They set forth 12 non-economic conditions to settle: one, the pastor would be reported to criminal authorities; two, the bishop would write a letter of apology to the families involved; three, the bishop would make a public apology to the church congregation and public; fourth, outside counseling would be provided to victims requesting such help; five, several of the victims would be chosen to meet with the bishop on a periodic basis to discuss concerns; six, any time an accusation was made, the cleric would be suspended from duties and an independent investigation would be conducted; seven, church officials and employees would receive training to identify potential abusers; eight, children would be given “safe touch” instructions; nine, a hotline would be set up so that complaints could be received expeditiously; ten, the offending cleric would be defrocked and denied financial assistance from the diocese; eleven, a cleric would not be permitted to travel alone with children under the age of 18; twelve, a pastor would not be permitted to have overnights with children under the age 18 without chaperones present. These conditions were agreed to and implemented. With the noneconomic conditions in place, the economic portion of the settlement was more easily resolved.
1. Inventing new mediation formats.

Responding to Chief Justice Burger’s admonition to be inventors, the profession has engineered five new mediation formats, which have become, in recent years, standards in the industry. In addition to the messenger format, which has a history going back to the time of Confucius, the profession has added a trial format, conference format, caucus format, transformative format, and collaborative format. Each serves a different purpose and fills a specific need.


29 [1] Messenger Format: This format found its origin at the time of Confucius. With parties in separate rooms, the mediator shuttles back and forth, conveying new demands and offers. The messenger, however, is not permitted to interject himself or herself into the process, even if asked. It is up to the parties to take the lead in resolving the matter. For this reason the process is little used today at least in Western legal systems. See, RICHARD M. CALKINS AND FRED LANE, LANE AND CALKINS MEDIATION PRACTICE GUIDE, § 4.02 (Aspen 2006).

[2] Trial Format: This format is conducted with the mediator acting as a hearing officer. After hearing evidence and/or argument of counsel, he or she will make a nonbinding award, which the parties can accept or reject. The parties always reserve the right to go to trial. However, if they do, they generally must improve their position by certain percentage or be penalized. The actual hearing can be evidentiary or in summary form. The panel hearing the matter may be a single person or panel of three.

The State of Michigan previously utilized a trial format whereby a panel of three mediators, lawyers, acted as hearing officers. After listening to oral arguments of counsel presented in summary form, they made a nonbinding award as to the value of the case. MICH. Ct. R. 2.403[B]. If a party or parties rejected the award and chose to go to trial, the person had to improve his or her position by 10% or pay a penalty – they were required to pay attorneys fees and costs of the opposing party. MICH. Ct. R. 2.403[D]. See, James McNally, letter to the editor, Mediation in Michigan is Really a Form of Case Evaluation, DISP. RES. MAG. Winter 1988 at 2.

[3] Conference Format: Here the mediator keeps parties together in joint session throughout the entire mediation. It is preferred in family law where parties will continue to have contact with each other at weddings, funerals, family gatherings, and so on. One of the goals of the mediator is to help the parties learn to communicate. It is also favored in employment cases where employees seek to continue employment. See, Leonard L. Riskin, Teaching and Learning from Mediators In Barry Werth’s Damages, 2004 J. DISP. RES. 119, 134. See also, Tristin K. Green, Work, Culture Discrimination, 93 CAL. L. REV. 623 (2005).

[4] Caucus Format: Here the mediator commences with all parties together for introductory remarks of the mediator and opening statements of counsel. Thereafter, the parties are placed in separate rooms and the mediator shuttles back and forth with new demands and offers. Generally, the mediator is facilitative and actively participates in the process to help find accommodation. At the conclusion of the mediation, the parties meet again in joint session at which time the mediator announces the results – settlement, no settlement, to be continued. If the latter, dates and locations are set.
And, in addition to the six standard formats, parties have also invented boutique formats to meet particularized needs. For example, when Southwest Airlines first came on line, it had a trademark quite similar to one used by a regional southeastern airlines, so much so, that trademark litigation, costing in excess of $1 million each and 3 to 4 years to complete was anticipated. The two CEOs decided that was not the road to travel since the cost of designing a new trademark would be no more than $30,000. Instead, they agreed to arm wrestle, two out of three. For the cost of a party, the matter was immediately resolved.\(^{30}\)

2. Providing a reality check.

Mediation, however, is far more flexible than simply engineering new formats. It provides alternatives when parties are having difficulty reaching agreement. When the parties are unrealistic,


[5] *Transformative Format*: This is a more recent format used primarily in divorce. It utilizes the conference model. It places more responsibility for settlement in the hands of the parties, and the mediator has less of a presence. For a detailed discussion of transformative mediation, see Joseph P. Folger & Robert A. Baruch, *Transformative Mediation and Third-Party Intervention: Ten Hallmarks of the Transformative Approach to Practice*, 13 MEDIATION Q. 263 (1996).

[6] *Collaborative Format*: This is a newer format and also is used primarily in divorce and family matters. A number of professionals are involved: each party is represented by counsel; a professional psychologist also works with the parties to help them cope with the stress of divorce; another professional works with the children to help them through this difficult time; and a financial planning consultant helps the parties works through the intricacies of their finances. One of the key elements of the process is that counsel must withdraw from the process if settlement is not reached. They are not, by agreement, permitted to proceed with the divorce.

mediators have engineered several vehicles to provide a reality check. They include (1) summary jury trial, (2) focus study, and (3) mock trial.\footnote{The Summary Jury Trial, which normally takes one day to complete, permits the parties to present their cases in summary form to an impaneled jury. The jurors may be selected from the jury pool if the court will permit, or selected from the community for the purpose. After presentation of each side's case in summary form, the jury is instructed and retires to deliberate. Normally, a set period of time is allowed for deliberations. The jury then returns a verdict, which is not binding on the parties. Thereafter each party and counsel separately confer with the jurors to learn how they reached their verdict, thereby giving the parties a better sense of the value of the case. The parties can also review a videotape if one is made of jury deliberations. See, Thomas Lambrose, The Summary Jury Trial – An Alternative Method for Resolving Disputes, 69 JUDICATURE 286 (1986).}

Case Study: Plaintiff exited an interstate highway into a local southbound street. She was traveling in the right lane. A bus was ahead of her in the middle lane. Without notice the bus made a right-hand turn in front of the plaintiff and she bumped into the rear right tire hitting her head on the door window. She complained of migraine headaches which continued down the time of mediation. She demanded $150,000. The insurance carrier for the bus company offered her $65,000. She rejected the offer as an insult. With the mediation failing, the mediator suggested the parties engage in summary jury trial as a reality check. Both agreed and a one-day trial was conducted. The jury returned a verdict of $35,000. When questioned by plaintiff's attorney, the jurors explained that they felt plaintiff was exaggerating her pain and indisposition. Within 48 hours allowed by the bus company, plaintiff accepted the $65,000 offered and the case settled.

Focus Study is another vehicle for providing a reality check. Although both parties can participate, it is generally conducted by one of the parties for its own benefit. A psychologist generally conducts the process that takes one day. Jurors are carefully selected from a cross-section of the venue as to age, sex, ethnicity, economic status, and education. The entire proceeding is videotaped. The psychologist presents the case to the jurors in summary form based on pleadings, depositions, documents, and expert reports. Jurors are asked to give their opinion as to what jurors in the venue would do, best case-worse case, and what they would do if selected in the actual case. See Richard M. Calkins, Mediation: The Radical Change from Courtroom to the Conference Table, 58 DRAKE L. REV. 369, 370 (2010).

Case Study: Plaintiff met his wife for dinner in town. After, they started driving back to their home in separate cars. Defendant was intoxicated and was speeding at 104 mph and hit plaintiff's wife head on and killed her instantly. Plaintiff was following and witnessed the tragedy. He sued on behalf of his wife's estate and for himself as a bystander, demanding $2.5 million. The venue was the most conservative county in a rural state, which had never entered a million-dollar verdict.

To convince the insurance company to pay more than $1 million, plaintiff's counsel had a focus study conducted, and at the mediation presented a video of the conclusion of the study, when jurors discussed what they felt jurors in the county would award. One of the 10 jurors would have given $500,000, the next lowest, $1.3 million, the rest up to $10 million. The insurance carrier was prepared to offer $750,000 total before the mediation. The carrier asked to review the entire eight hours of video and interview the psychologist. This was done and it offered $1.5 million to settle, which was accepted.

The Mock Trial can also be used as a reality check. Normally only one party conducts it for its own benefit. The jury is selected from the community and the case presented with live testimony and arguments of counsel. The law office conducting the process supplies counsel and parties and witnesses for the other side to complete the trial. The jury deliberates and returns a verdict, which gives the party a better idea as to value of the case. See Richard M. Calkins & Fred Lane, Lane & Calkins Mediation Practice Guide, § 1.02 (C)(5) (Aspen 2006).
3. Interrupting the mediation to take a different approach.

Once a trial commences in court, its course is fixed to conclusion. Not so with mediation. The great flexibility of mediation is that once commenced it can be interrupted to conduct further investigation, research legal points, conference potential witnesses, who have not yet been

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**Case Study:** Plaintiff farmer visited another’s farm to examine cows he had just purchased. Defendant seller took him to the pasture driving an ATV vehicle. Plaintiff followed on a second ATV vehicle. After viewing the cows, the two returned to the farmhouse; however, driving back they took the scenic route through some woods and up a steep hill. The defendant, familiar with the ATV, easily negotiated the hill. Plaintiff did not, and his ATV flipped over landing him on his back. Plaintiff broke his back and asserted he had to give up farming.

Plaintiff sued the farmer and the manufacturer of the ATV for failure to have signage which instructed on how to ride the ATV up a hill. The claim against the farmer was settled, and the claim against the ATV manufacturer was mediated. Plaintiff demanded $600,000 and defendant offered $300,000 and the mediation failed. Plaintiff’s counsel then arranged to have a mock trial conducted. A jury was selected and lawyers in counsel’s law firm were assigned various roles. The two-day trial was conducted and the jury returned a verdict of $120,000, a definite reality check for the plaintiff. When the jurors were questioned, it was learned that they felt plaintiff was exaggerating his injuries. Plaintiff quickly realized that a jury of farmers were not favorably disposed to award a fellow farmer with a large verdict. Thereafter, the case settled for $350,000. The mock trial served its function to provide a reality check.

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**Case Study:** Plaintiff celebrated his 21st birthday by driving to town to purchase five wine coolers. He parked at the town square. Defendant, a 16-year-old boy, parked his car next to the plaintiff and the two started talking. Three girls, also teenagers and below the legal age, pulled in next to the boys and the five conversed. They decided to go the old gravel pit to skinny-dip. Arriving there, they found the water too cold so they partied, drinking beer defendant had in the trunk of his car. They then decided to drive to another town to see if there was any action. One of the girls, who had been drinking heavily, insisted on driving. Arriving at the second town, a black pick-up truck with K.C. lights started following them. At this point, one of the girls said she had a curfew and had to get home by midnight. Driving back, the five were followed by the black pick-up truck. Trying to lose it, the young lady driving turned down a gravel road and sped up to 84 m.p.h. She lost control, and the car left the road and rolled over several times. All exited the car with minor injuries except for plaintiff, who was now a paraplegic.

Plaintiff sued the 16-year-old who owned the car for allowing the inebriated girl to drive it. At the mediation, the three girls and defendant did not attend; only the insurance adjuster attended. The defense raised was the plaintiff purchased the beer consumed by the underage teenagers. Plaintiff vehemently denied it and made a demand for $1 million. Defendant offered $300,000 and the mediation came to a halt. Rather than terminate the mediation, the mediator was given leave to interview the three girls and defendant in as much as they had not yet been deposed. This was done. The girls did not know who purchased the beer. Defendant insisted plaintiff had. Because defendant was underage and his parents had no liquor in their home, there was no where he could have gotten the beer.

The mediator then met again with plaintiff and pressed him for the truth. He finally admitted that although Saturday night he purchased the wine coolers for himself, he did purchase the beer Friday night and put it in the trunk of the defendant’s car. The case quickly settled for $320,000.

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**Case Study:** Plaintiff, in mid-forties, was sexually abused by a cleric in Ohio when he was an altar boy. Suit was threatened and the matter was mediated in Chicago, Illinois. Plaintiff demanded $950,000. During the course of the mediation, the mediator inquired of defense counsel what the statute of limitations was in Ohio for such
deposed, or, after one day, continue the mediation to another day or by telephone. More important, the mediator can be sensitive to the emotional needs of the parties and orchestrate the mediation actions. To his surprise, counsel was not certain. He quickly had an associate research the question, and in 30 minutes handed the mediator a decision of the Ohio Supreme Court: *Pratt v. Stewart*, 929 N.E.2d 415 (Ohio 2010). It stated that a child has 12 years after reaching majority to file his action. More than 12 years had elapsed in the instant case; therefore, plaintiff faced the prospect of having his case dismissed. With this established, counsel for the plaintiff recommended compromise and the case settled quickly.

34 *Case Study:* Plaintiff entered a nightclub and was talking to friends when he was hit in the jaw by a fire extinguisher thrown by the bartender. The latter got into an argument with a patron standing at the bar and tore a fire extinguisher from the wall and threw it at him. He ducked and plaintiff was hit fracturing his jaw.

Before suit was filed, the matter was mediated. The insurance carrier denied coverage on the ground that intentional torts were excluded from coverage. The mediator inquired whether the bartender had previously engaged in such conduct. Plaintiff stated that a friend witnessed the same bartender arguing with a patron on a prior occasion. He believes the friend mentioned this to the owner, who took no action. Recognizing that failure of the supervisor to act was negligence, which was covered under the policy, the mediator inquired whether the friend would come to the mediation and speak to the adjuster. The friend arrived during the lunch hour and affirmed the above, including the fact that he spoke to the owner. The case quickly settled for a fair figure.

35 When a mediation does not settle in one day, mediators are encouraged to keep the process going by telephone thereafter, or even caucus separately at the party’s or attorney’s offices. Experience shows that when mediation is continued by telephone, for example, time works for the process, not against it. In other words, parties are more apt than not to soften their positions if given quiet time to think about it. Also events may occur which will further settlement possibilities.

*Case Study:* Plaintiff owned two large grain bins in which to store corn. When they were empty, they were cleaned out by an independent contractor. For some reason, he used the wrong cleaning agents and the new grain placed in the bins became contaminated and could not pass FDA federal standards. After disposing of the corn, plaintiff sued the contractor for $750,000.

At the mediation, the insurance carrier offered $250,000, and at the end of the day raised the offer to $450,000. Plaintiff went from $750,000 to $650,000 and would move no further. The mediator informed both parties that in the next few days he would contact them by telephone. His hope was that given a chance to think more about the matter both would compromise further. The next day he called the adjuster, who agreed to move to $550,000 and not one penny more. He waited a day to call plaintiff, knowing that the following day was his golf day. Being a golfer, the mediator hoped plaintiff would have a good round which would definitely loosen him up. He did and he agreed to the $550,000. And the matter settled.

As outlandish as this case was, it does illustrate that changed circumstances can change the dynamics of settlement possibilities. The following case also illustrates this.

*Case Study:* Plaintiff, a woman, graduated the top of her law school class and was editor-in-chief of the law review. Any number of law firms wanted to hire her. She selected a large firm with offices in several cities. She was assigned to one of the satellite offices. As it turned out, the managing partner took a liking to her and harassed her on repeated occasions. She insisted he stop, but he persisted. She then reported the matter to the home office. A senior partner, a female, investigated the matter and concluded that “boys will be boys. Just ignore him,” was her advice. She then resigned her job, taking a constructive discharge. She hired an attorney and threatened to sue under Title VII of the Civil Rights Act of 1964 for sexual harassment. She demanded $800,000
accordingly. If the mediator senses the parties are becoming tired, frustrated, or stressed out, he or she can continue the process to another day to allow the parties opportunity to reflect on the matter. In the family setting, this is called "pillow talk." If members of a family are concerned that a family member, a parent for example, is being emotionally crippled by the lawsuit, they can be given time over a few days to talk to the person in a quiet setting. More times than not, this time out will lead to resolution, for they will convince the party of the need to settle. A judge, in a similar setting, has neither the time nor capacity to take such action once a trial commences. He or she cannot be concerned whether the parties are emotionally stressed or need to consult in a quiet setting. Judges are not wired to be concerned about the stress level of the parties.

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even though she was hired by another firm within a month at a slightly higher salary and better tenure-track opportunities. The defendant firm offered $300,000 to settle.

At the mediation there was little progress, and it was continued. The mediator kept in touch with all concerned by telephone, inquiring whether any progress was being made. Almost a year later he was called in for another try. This time the case settled and he quickly learned why. The next day the case had to be filed. Once it was, it had no value to either party. Plaintiff really had no damages, emotional or otherwise. And the law firm, which sought a confidential resolution, would have suffered the bad publicity it sought to avoid. The case settled for $350,000.

There is a difference of opinion as to whether the mediator should hold parties until late at night while the “iron is hot,” rather than release them when they become tired and frustrated. It is the author’s opinion to put it over to another day. The worse that will happen is the parties will not change their positions; however, they will not make them worse. More times than not they will improve their positions. Time works for the mediator, not against.

Case Study: At birth a healthy baby girl was given a diphtheria, pertussis, tetanus shot which crippled the child for life. The parents sued the doctor administering the shot and the matter was resolved for $80,000, which netted the family $34,000. Later, it was learned that the child was eligible to receive $2 million under the National Vaccine Injury Compensation Act. They then sued the lawyer for legal malpractice for not pointing this out.

At the mediation, the parents were present on behalf of the child (she was 17 years old and had the mentality of a six month old baby). The attorney’s malpractice coverage was $1 million. Ultimately, the family demanded $1.5 million and the carrier offered policy limits. The father rejected the offer out-of-hand stating, “No amount of money can cover what they did to my baby.” The mother remained silent; however, the mediator sensed she wanted to get the ordeal over. With the consent of the adjuster, the family was given over a weekend to consider the matter. The adjuster said that the mother and father will pillow talk the matter, that is talk about it even at night, and she will win out. The next Monday morning the father called and accepted the offer and the matter was resolved.

It should be noted it does not matter if the one seeking settlement is male or female, that person will win out most every time.
Mediators, as legal architects and inventors, have engineered other aids to settlement. An example is the polygraph test. They are, of course, inadmissible in civil and criminal trials because of their questionable reliability. Yet they are used in any number of nonlegal settings, such as clearing individuals for sensitive industrial and governmental positions. And they can be used effectively in mediation as part of the settlement process.  

There are two scenarios when the test can be effectively used: one, the parties are saying opposite things and one must be prevaricating; and two, where a party is attempting to establish credibility. In the first scenario, the test is rarely given because the person lying will refuse to take it; whereas, the one telling the truth will readily agree. Reasons given for not taking it are the person is sick or nervous, or the test is unreliable, or in any event, it is not admissible in evidence. The second scenario is where a party wishes to establish his or her credibility. In this instance the test is given and the results can impact directly on settlement discussions. In either scenario counsel must agree to permit the test. Most attorneys will agree to it for they want to know if the client is telling the truth. No attorney in a civil case will knowingly allow his or her client to perjure himself on the witness stand.

Case Study: Plaintiff was hired as chief financial officer of a small but prosperous corporation. She claimed that the CEO insisted on having an affair when they went on business trips together. She consented, she alleged, to keep her job. She finally called a halt to the affair because it was affecting her marriage. He persisted, so she quit her employment and sued for constructive discharge under Title VII of the Civil Rights Act of 1964.

Mediation was attempted. In the opening session, plaintiff’s counsel made his opening statement, explaining plaintiff’s position, adding that liability was quite clear; only damages were an issue.

Defense counsel then responded contending their relationship was consensual and began long before she was hired. With this statement, plaintiff’s counsel jumped up and said he would not listen to such lies. He left the mediation with his client much to the shock of the others. Fortunately, the mediation was being held in his office so he did not have far to go.

The mediator then suggested a polygraph test be offered to the parties. He assured counsel the person lying would not take it. When offered, both agreed to take the test. A single operator was selected and the test scheduled, one in the morning and the other in the afternoon. However, the night before, one of the parties backed down stating she was sick, nervous, and the tests were not admissible in any event.

The lawyers were then satisfied after the CEO passed that plaintiff was lying. The case quickly settled for a satisfactory amount. Later, plaintiff’s counsel called the mediator to tell him how shocked he was. He was certain his client was telling the truth. He told her she had to settle or she would have to find another attorney. He would not allow his client to perjure herself on the witness stand.

Case Study: In this case, the test was used to establish the victims of sexual abuse were telling the truth. The mother of an African-American family alleged that her six children, three boys and three girls, were raped by a white cleric. One of the girls, 14 years old at the time, became pregnant and gave birth to a boy who had
4. **Mediation permits ex parte confidential communications.**

One of the most innovative processes engineered by mediators is the caucus mediation format. It places the parties in separate rooms with the mediator shuttling back and forth between them. Because the parties are separated, it permits the mediator to speak to each side in a confidential setting, to conduct ex parte communications: such would invite reversible error and even sanctions if conducted in the courtroom trial.

The confidential caucus with each side opens new avenues of settlement opportunities never envisioned nor contemplated in the past. The importance of the confidential caucus and ex parte communications are (a) the mediator can more easily build rapport and trust with the parties and further the healing process; (b) he or she can inquire about weaknesses in each party’s case and what might be expected from a jury, best case/worst case; (c) the party is given an opportunity to vent and tell his or her story without offending the other side; (d) the private caucus enables the mediator more effectively to uncover hidden agendas or special interests which can further settlement possibilities; and (e) the mediator can more freely help a party and counsel evaluate their case.

(a) **Build rapport and trust**

In admonishing lawyers to be “healers of conflict,” one of their primary tools is to build rapport and trust with each side. This, to say the least, cannot occur in the courtroom where the parties are doing battle. Unquestionably, parties in conflict are angry, frustrated and often hating each other. In the adversarial setting the judge could be less concerned about such emotions. The mediator is

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Caucasian features. Everyone assumed the cleric was the father. Three days before the mediation, a DNA test was performed which established that the cleric was not the father. The defending church then assumed all the allegations of abuse by the family were contrived. It offered $950,000 for the entire family. The mediator suggested that plaintiffs’ counsel arrange for the six siblings, now adults, to take polygraph tests. This was done as to two of the boys and two of the girls – the oldest son was in the penitentiary and the one daughter was bipolar. The tests were given and three passed, one son and two daughters. They established that the pastor had raped each and induced them to have sex with each other while the cleric watched. The youngest boy’s test came out inconclusive; he did not pass. This actually gave more credibility to the others who did pass. The family accepted $3 million settlement offer.
concerned and wants to find a basis for healing them. The private caucus gives him or her a vehicle to reach each party and begin the process.

Rapport and trust can be established in several ways: First, the mediator can inquire into the background of a party – their interests, hobbies, activities, children, and grandchildren. Such inquiry shows the mediator is interested in the party as a person and not just another plaintiff or defendant. Where common ground is established between mediator and party, rapport begins. As the parties recognize that the mediator is a concerned friend, they begin to relax and place more trust in what the mediator is doing. Essentially, parties want to like and trust their mediator and the latter needs to give them reasons for doing so.

Second, rapport and trust can be developed by the mediator inquiring into the strengths of the party’s case and what a jury might do. Showing such interest helps the mediator bond with the party demonstrating he or she cares. 39

Third, rapport and trust must also be established with counsel. If the mediator has not worked with the attorney before, an initial credibility gap might exist. Counsel needs to be confident the mediator is truly impartial and not advocating for the other side. This can be established when counsel is given opportunity to talk about the case from his client’s perspective and the mediator listens with interest. It can also be furthered if the mediator can find reasons to complement the attorney in front of the client for obvious reasons. Attorneys always appreciate support from an independent source.

Establishing rapport and trust gives the mediator credibility. The parties know the mediator has integrity, is honest and is maintaining the highest standards of professionalism. When the mediator

39 Case Study: Plaintiff was injured when broadsided by a delivery truck. The insurance adjuster was not very cooperative and offered only a modest amount. In caucus with the plaintiff, the mediator inquired as to whether there was any evidence the driver had been drinking before the accident. Up to that time drinking had not been an issue. Plaintiff’s counsel was surprised when plaintiff answered that the driver had been seen at Sally’s Bar just 20 minutes before the accident. Although this would not establish that he was intoxicated, it might indicate why he was inattentive and slow to react. Plaintiff was able to produce at the mediation a friend who would verify that the driver had been at Sally’s Bar on the afternoon in question, and that he did so every afternoon at the end of his deliveries. Concerned that this evidence might be admitted, the insurance company increased its offer and the case settled.
explains there is no more money available, he or she is believed. The parties know he is not advocating for the other side.

(b) the ex parte caucus assists the mediator in learning about the case

In the adversarial setting of the courtroom, the judge or jurors learn about the case through direct and cross examination of witnesses and the admission of documents. In mediation, the mediator has a much more direct source of inquiry. He or she can directly ask counsel in private caucus what the case is about. He can ask questions never before asked of a party in American jurisprudence. The mediator can ask counsel what he feels are weaknesses in his client’s case and what he feels is the worst case before jury. Clearly, a judge, jury, opposing counsel, even an arbitrator could not make such inquiry. With this information garnered on both sides, the mediator has an understanding of the case untainted by rhetoric or advocacy of attorneys.

(c) The private caucus permits venting

Parties often need an opportunity to vent, to tell their stories to someone who will listen. They need their day in court. They often think of the mediator as a judge, someone who will listen.

40 Case Study: Decedent, an 18-year-old graduating senior from high school, was valedictorian of her high school class, president of the student body, head cheerleader and a model student and person. She received a full ride scholarship to an eastern women’s college. She was killed when she made a left-hand turn and hit by a semi-truck entering the intersection. Defendant claimed decedent turned on a red light and that it entered the intersection on a yellow light. Decedent’s counsel contended the truck was running a red light and decedent was turning on a green arrow.

In caucus with decedent’s counsel, the mediator inquired in confidence what the weaknesses in the case were from plaintiff’s estate’s perspective. Counsel responded that there was a witness that was in the lane next to the turn lane who would testify that he had stopped and was looking at the light to proceed west, which was red. Out of the corner of his eye he saw decedent begin her turn. She had to be turning on a red light because the green turn signal did not come on until the light going west turned green. It was still red, thus, she was comparatively at fault. Counsel at some point would have to disclose the witnesses to the defense.

On the defense side of the case, when inquiry was made, counsel explained that all semi-trucks have black boxes, which record their speed at all times. The tape showed that that 30 seconds before the accident, the truck was traveling east 50 mph in a 40 mph speed zone. It showed the truck slowing down 42 mph and then speeding up. At this point the crash occurred. Further, when the light going west was red, it was also red going east. When the light going west turned green, the turn signal came on; however, the light going east remained red. The truck had to be running a red light.

With these facts established, the case quickly settled favorably for the decedent’s estate.
Parties vent for several reasons: one, it helps them to relieve some of the anger, anguish and frustration building up inside; two, they vent for therapeutic reasons, to tell someone how much they are hurting; and, three, they need to explain why they are right and in their opponent wrong.

Venting is easily accommodated in private caucus. In the courtroom such an outburst would put a party in jeopardy of being held in contempt of court. The mediator is trained to listen with compassion, sympathy, and understanding. Most often when accomplished the party is prepared to move forward with meaningful discussions.\textsuperscript{41}

There is another aspect of venting that needs to be considered. There are times when the party needs to blame someone for all their troubles. Most times they blame the party opponent. Sometimes, however, they want to blame their attorney or even the mediator. In such circumstances, the mediator needs to act as a lightning rod and deflect as much of the attack as he can. The mediator is trained to ground any such abuse with calmness and professionalism and help the party move forward.\textsuperscript{42}

\textsuperscript{41} Case Study: Plaintiff appeared at the mediation site wearing a coat and tie. He flew in from an eastern state to participate in a mediation. He was suing a church for harboring a pedophile cleric, which sexually abused him when he was a child. A bishop attended the caucus. Plaintiff presented well and was calm and articulate. He asked the bishop if he would like to know how angry he still was. Before the bishop could answer, he opened his briefcase and took out a 12 inch plastic tube. He then attached a shorter tube at the bottom making an upside down “T.” He then took the tape off the other end, and he was holding the dagger, which he pointed at the bishop. The mediator was ready to grab him, but quickly realized he was not threatening the bishop, only making a point. After this display, the mediation was successfully resolved. Several days later, plaintiff’s counsel received a call from claimant’s wife. She thanked counsel for getting the matter settled; however, the real reason for the call was to thank him for allowing her husband to speak about his hurt. She explained they were not out of the woods yet; however, her husband was definitely doing better controlling his anger and the way he treated her and their two daughters.

\textsuperscript{42} Case Study: In the In re Midwest Milk Monopolization Litigation, supra n. 10, the mediators proposed that this 21 year old case settle for $21 million. Representatives from both sides were skeptical it would work and several declined to present it to their respective co-op boards because of the anger and frustration such a proposal would generate. The mediators agreed to make the presentation to the various co-op boards to shield the representatives from any abuse.

The mediators met with the various boards. There was considerable anger directed at them built up over 20 years of litigation. Acting as lightning rods, the mediators answered the participants’ concerns, which had a calming effect. The case later was resolved for the $21 million, a published figure.
(d) the confidential caucus facilitates uncovering special needs

In the courtroom, it is totally irrelevant if parties have special needs or interests, so-called hidden agendas. Within the parameters of a mediation they can be all-important. Often they will dictate settlement. Certainly Chief Justice Burger considered such hidden agendas all-important to the mediator who is a "problem solver." They can be the catalyst to resolution.

The ex parte confidential caucus permits the mediator to search out hidden agendas. Sometimes parties are not even aware they exist or that special needs might be satisfied. Being able to talk to a party privately, one on one, in caucus, enables the mediator to begin identifying these needs. For example, the hidden agenda or need might be as mundane as settling immediately in a teenage death case to have funds to move the family to a better school district to benefit the surviving

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43 Case Study: Plaintiff worked as a cleaning lady at a local hospital. She had taken leave from her job because of complications in her pregnancy. She was a single woman and had a little boy six years old. She was involved in a fender bender accident and suffered soft tissue injuries, which did not impact on her pregnancy. Her attorney demanded $20,000 and the insurance carrier offered $8000. Finally, the demand was reduced to $15,000 and offer increased to $10,000. The mediator suggested they split the difference; however defendant declined. During a lunch break the mediator encouraged the plaintiff to go and get something to eat. He then learned she had no money. In fact, she had no money for dinner that night or the next day for her and her son and had to wait until Friday to get some food stamps. Talking to her further, the mediator learned she was three months in arrears on her mortgage payments which was of concern.

The mediator gave plaintiff $20 for lunch. When the adjuster returned, the mediator explained the plaintiff’s plight. He noted she was not complaining and it took some effort to learn the difficult time she was having. He then asked the adjuster to increase his offer to $13,000 because this would give her funds to buy food for herself and child, bring the mortgage up-do-date, and take care of her until she could get back to work. He emphasized the plaintiff was a very worthy person and the adjuster had a golden opportunity to help someone find a little comfort. The adjuster agreed and immediately wrote a check for the full amount and the papers were signed.

44 Case Study: Plaintiff was injured in a car accident. At the mediation he made unreasonable demands contrary to counsel’s advice. He was angry and wanted to punish the defendant even though it was the insurance carrier negotiating settlement.

The mediation appeared to be failing when the mediator asked counsel if discovery had been completed. He answered the plaintiff’s wife had yet to be deposed. Plaintiff interrupted and said he would not permit his wife to be deposed because she was struggling with depression. Counsel pointed out the defendant had the right to depose her because she had a loss of consortium claim. Plaintiff then instructed counsel to settle the case; he didn’t care what he received. He would not allow his wife to be deposed. The case then settled for a fair figure.
children. Police officers, abused as altar boys, might accept less to assure settlement, rather than file a complaint and disclosing the abuse, which might impact on their status on the force and promotions. The agenda might even be the need for a person twice convicted of felony charges (possession of narcotics) to obtain immediate funds for psychiatric treatment to avoid a third conviction and mandatory life term.

On the defense side, the agenda may be for insurance company to avoid a possible "runaway" jury verdict as occurred in a prior case raising the same issues. Or it might be the need for a company

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45 Case Study: Decedent, a 17-year old male, had a heart attack on the football field and rushed to the hospital where it was determined he had to have a heart transplant. He was hooked up to a defibrillator and kept in the hospital waiting for a heart to become available. At one point, a nurse changed the defibrillator reattaching the lines improperly and decedent died. His mother, a single parent with six other children, sued on behalf of his estate. She demanded $2 million. The insurance carrier offered $500,000. The mediator suggested the parties split the difference at $1 million.

In private caucus, the mediator learned the hidden agenda of the hospital. It was trying to build a reputation as a regional heart transplant center and also wanted to end a criminal investigation that was being conducted. The agenda of the mother was more complex. She wanted to settle immediately so that she could benefit the remaining children by moving to a better part of town and a better school district. She might receive more if she litigated, but this would take four years to complete, and in three years three of the children would already be out of high school and would not benefit from the settlement school-wise. However, plaintiff's counsel also had a hidden agenda. He wanted the family to move into his son's school district so that the next two sons of high school age could play on his son's high school basketball team. He felt they were so good that the school could win the city championship and possibly the state title. Thereafter, the case settled for $1 million.

46 Case Study: Two police officers were sexually abused when children. They compromised significantly to avoid filing a lawsuit, which might have impacted on their status on the police force and their promotions.

47 Case Study: Plaintiff had been twice convicted of drug possession and sent to the state penitentiary. He had been released when he mediated his claim that he had been sexually abused as a child. He felt his drug problems were an outgrowth of the abuse. At the mediation, he insisted on settling in order to receive immediate funds for psychiatric counseling. He was very concerned that without help he would receive a third felony conviction and sent to the penitentiary for life under the mandatory guidelines.

48 Case Study: Plaintiff purchased a $750,000 insurance policy from proceeds she received in a medical malpractice action brought against the doctor for the death of her husband. An insurance agent examined her portfolio and advised her to purchase a policy from him, which had a higher rate of return. She did not know that the sale and purchase triggered federal income taxes which more than offset the gain on the newly purchased policy.

She went to an attorney who told her she might recover $1 million as was recovered in a Texas action against the same company for the same practice. When the case was mediated, the mediator inquired what was the most she could recover from a jury. Counsel responded $150,000. When plaintiff heard this, she was visibly upset at her attorney. Counsel tried to explain that in Texas the agent knew of the tax consequence but did not disclose them.
going public divorce to avoid reporting in its prospectus a pending $8 million lawsuit, which might negatively impact on the price of the initial stock offering. 49

5. If mediation fails, “invent” other ADR mechanisms to assist in the process.

Once trial commences, no one can stop the train going down the tracks until it runs out of steam or reaches its destination; not so with mediation. If a mediation appears to be failing, its flexibility permits the parties and attorneys to switch to another format which might prove more productive. They can even "invent" a new procedure on the spot to meet the needs of the parties. Consider the following scenarios:

a. mediation-arbitration

A mediator was asked to mediate a dispute between partners, who wished to separate and divide up the business. Recognizing that the parties could agree on nothing to date, and that failure to separate amicably at this time, could cost both their business and possibly force them into bankruptcy, the mediator suggested mediation/arbitration. He would first attempt to mediate the matter, and if

In the instant case, the agent did not know; he was merely negligent and therefore no punitive damages could be awarded.

Very unhappy, plaintiff lowered her demand to $500,000 and the defendant offered $75,000. Ultimately, plaintiff reduced her demand to $300,000 and would not move further. And defendant accepted. What plaintiff did not know was that the home office of the carrier had instructed the representative to pay whatever it took to settle. It did not want to risk another Texas.

49 Case Study: Plaintiff retained a computer company to install a computer system to handle its new credit card business. At the completion of the three-year contract, plaintiff threatened to sue for parts of the system that did not work or were not completed. It sought $8 million.

In the course of the mediation, the bank lowered its demand from $8 million to $2 million and would not move further. The computer company went from $500,000 to $800,000 and it would move no further.

Through the mediation, the mediator learned that defendant was going public. He knew it had to settle because it could not allow an $8 million claim to remain on its books. This would have had a serious impact on the value of its initial stock offering. Defendant finally raised its offer to $1 million and then $1.3 million and plaintiff accepted. Plaintiff also learned of the stock offering and therefore patiently waited until defendant made a reasonable offer.
that failed, he would decide the matter as arbitrator. This assured finality and avoided the parties going to court. They agreed, at the urging of their attorneys, and the matter was resolved.\textsuperscript{50}

b. summary arbitration

A mediator attempted to mediate an antitrust dispute between two business entities but failed. The parties had already spent $500,000 each in discovery and anticipated spending another $1 million to complete discovery and try the case. Trial was expected to take two months with an appeal to the federal Ninth Circuit Court of Appeals assured. Defendant was prepared to bear these costs; the plaintiff was not a position financially to do so.

Counsel for the parties met with the mediator and a summary arbitration process was worked out to save both sides money and time in resolving the dispute. The partners allocated six days to resolve the matter with no appeal, and the case was set for hearing two months of the original mediation and not four years, and at minimal cost.\textsuperscript{51}

\textsuperscript{50}Case Study: Partners originally operated a single repair shop, but later expanded to two shops. As the business grew, so did their disagreements until they could no longer talk civilly to each other. They finally agreed to separate but could not agree on a basis for dividing the business. They agreed to mediate.

At the commencement of the mediation, the mediator placed the partners in separate rooms. He then met with counsel and asked them to work together with him in resolving the matter, rather than advocating. He assured them that their discussions with him would be kept confidential and not discussed with the parties. In this way counsel could act in the best interest of both parties in resolving the matter.

Council and the mediator, using the conference format, discussed each issue that had to be decided. When they reached agreement, it was presented to their respective clients for approval and then they addressed the next issue. Only one issue did he, acting as arbitrator, have to decide. The attorneys accepted the arbitrator’s ruling and went on to the next issue. In eight hours the matter was concluded and the business divided between the partners. The key to resolution was getting the lawyers to work together for the good of both parties, rather than advocating for their respective clients.

\textsuperscript{51}Case Study: Defendant, a large regional telephone company, sold its Yellow Pages on a regional basis. Plaintiff initiated a Yellow Pages of the local community basis. Defendant liked the concept and did the same, driving plaintiff out of business. Plaintiff then sued under §§ 1 and 2 of the Sherman Act seeking treble damages and costs and attorneys fees, as provided by statute. The mediation failed, plaintiff turned down a $1.2 million offer. Because of the great costs that would be incurred and the time to prepare and try the case over a two month period and appeal to the Ninth Circuit Court of Appeals, the parties set down with the mediator to craft a more streamlined summary process. The intent was to stop costly discovery and resolve the matter in days rather than months or years. A format was established as follows:
c. breakup of a law partnership – European arbitration

A contingency fee lawyer, partner in a law firm that billed primarily by the hour, decided to separate from the firm. A dispute arose as to how much he owed in costs and expenses advanced by the firm to prosecute his contingency fee cases. Just before leaving the firm, he received a large settlement in one of his cases, which he deposited in his personal account rather than the firm account. For this, the firm reported him to the ethics committee of the State Bar Association. Rather than permit the break-up to become a public record, defendant requested mediation; however, defendant rejected this but agreed it would arbitrate the matter. An arbitrator was selected.

Recognizing that formal arbitration could be costly, the arbitrator proposed a European format, whereby he would do his own discovery, questioning, witnesses and examining documents. He also suggested he would work at the convenience of the parties so that they would not have to retain outside counsel to represent them. The parties agreed and the following procedure outlined below was adopted.\textsuperscript{52}

\begin{enumerate}
\item Parties agreed to use three arbitrators both approved and who were experts in antitrust law.
\item No further discovery would be permitted. Depositions already taken would be submitted to the panel. Expert opinions were to be submitted without objection.
\item There was to be no live testimony, only summary argument of counsel.
\item The hearing on liability was to take six days. Monday, all motions were to be heard. Tuesday and Wednesday, plaintiff was to present his case in summary form. Thursday and Friday, the defense was to do the same. Saturday, the panel was to reach its decision and announce it. No written opinion.
\item If liability was found the date was to be set for hearing on damages, including attorneys fees and costs.
\end{enumerate}

This procedure was followed and the panel ruled for the defendant. The matter resolved within two months of the original mediation hearing and not four years later, and at minimal cost.

\textsuperscript{52} The arbitrator first resolved the ethical question and the complaint was dismissed. Thereafter, the arbitrator did the following:

\begin{enumerate}
\item Rather than have each side hire a CPA to examine the books, the arbitrator got the parties to agree on a single CPA and share the costs.
\item The arbitrator then set up a discovery process whereby he personally questioned witnesses and examined documents. He permitted both sides be present at all depositions and feed him additional questions they felt relevant. The parties also produced documents he requested as well as additional documents they wished him to review.
\end{enumerate}
d. after hearing, the parties given a second chance to negotiate

One arbitrator took advantage of the flexibility permitted even in arbitration. Rather than entering an award after hearing, he adopted a process whereby he reviewed the evidence with the parties and counsel and indicated how he was reacting to it. He suggested how he might rule on defenses raised and the damages pleaded. He withheld the final result. His goal was to clear the air of some of the obstacles obstructing settlement. At this point he gave the case back to the parties for further negotiations.

If the parties reached a settlement, it was entered as the arbitrator’s award. If no settlement was reached, he entered his own award and the matter was concluded. In conducting arbitrations in this manner, fifty percent of the time parties are able to reach agreement.53

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3. At the conclusion of discovery, the arbitrator wrote up findings of fact, which he submitted to the parties and asked them to make any changes, corrections, or additions they wished so long as they agreed. Those findings for which there was no agreement, he decided.

4. The parties then made closing arguments and the arbitrator made his award. They scheduled monthly payments as agreed to between the parties and the matter was concluded.

The process had several advantages: First, it was considerably less contentious and stressful on the parties. Second, the parties saved a great deal in costs and expenses because they handled the matter themselves. Third, because the parties directly participated in the process, they were able to accept the final result more graciously. Fourth, the matter was resolved much more quickly than formal arbitration or a courtroom trial. Fifth, the matter was resolved in a confidential setting so that outsiders did not even know there was a dispute. Further, none of the firm’s records, including partners salaries, became public. An important consideration.

53 The arbitrator found that when parties took advantage of the second opportunity, both were relatively satisfied if the case settled. He also found that if they did not settle and he entered an award for the same amount, both were generally unhappy.

Case Study: Defendant, a newly licensed medical doctor, was heavily in debt with medical school expenses. Working seven days a week to pay off his debts, he neglected his wife and children. She finally insisted they get away to celebrate their upcoming wedding anniversary. He agreed and they arranged to spend the weekend in the big city. Arriving on a Saturday, they visited the sites and concluded the day with a 2 ½ hour dinner at an upscale restaurant. Probably drinking too much, they returned to their hotel and went to the bar for a nightcap. When the bartender brought defendant his drink, it was not what he ordered. When defendant objected, the bartender said it was what he had been drinking all night. Defendant responded that he had just arrived.

Defendant’s wife insisted he pay the bill and they could retire. He resisted and the bartender signaled an off duty police officer, who was in uniform, to remove him. As the officer approached, defendant swung and hit him in the jaw, fracturing it. He was maced to the ground and taken to police headquarters where he was booked. Later he pleaded guilty and got a suspended sentence. The local paper carried the story on the front page, and the medical
e. **fixed high-low arbitrations**

Using their engineering skills, arbitrators have come up with an offshoot of high-low arbitration called fixed high-low arbitration.54 This is used primarily when damages are substantial and identifiable, but liability is in question. Rather than spend considerable amounts of money or pretrial discovery on damages, they are negotiated and fixed, a high and low. In other words, if liability is found the high is entered as the award, and if no liability, the low. The only issue tried is liability.55

Advantages of the process are, first, the case can be bifurcated and only the issue of liability tried; second, because no further discovery is required on damages, considerable costs are saved, particularly in expert testimony; third, the issue of liability can be tried by an arbitrator or sent back to
the judge for trial if the parties so desire. Most judges welcome the opportunity to limit the issues to be tried.56

f. baseball arbitration

Another creative mechanism that has been manufactured when mediation fails is "baseball arbitration." The format was taken from the major leagues when there is a salary dispute between player and his ball club. Each sets the figure they wish, the player, what he wants to receive, and the club, what it is willing to pay. The arbitrator, after hearing, must select one figure or the other and cannot make an independent determination, as in straight arbitration.57

This format has been incorporated into mediation. When the parties go this route, each side will set what they want to receive or willing to pay. The arbitrator, then, must choose one or the other and cannot make an independent determination; however he can recommend splitting the difference if approved by the parties. Each side can change their figure until the time a decision is made. The

56 There is a second format that has been engineered. Plaintiff and defendant set any figure they wish. In this instance, the mediator is not informed as to the high and low. After hearing, he makes a preliminary award. If it is above the midpoint, it is raised to the high. If below, it is lowered to the low. Thus, if plaintiff sets a high at $100,000 and defendant a low of $20,000, the midpoint is $60,000. If the arbitrator’s award is one dollar more, the final award is raised to $100,000. If one dollar less, it is lowered to $20,000. As often happens, one party or both may conclude the demand or offer is out of line and they need to change it. Plaintiff, for example, may decide to lower the demand to $80,000, which lowers the midpoint of $50,000. Defendant may then decide to raise its offer to $30,000, thereby raising the midpoint to $55,000. Parties, using this bidding process, might get close enough to settle on their own.

57 Case Study: The Federal Telecommunications Act of 1996, required local telephone monopolies to make their switching equipment available to competitors wishing to enter the market. The parties were required to enter interconnection agreements making the existing monopolies switching equipment available until the competitor could set up its own equipment. If the parties were unable to agree on terms for the interconnection agreement, they were required to arbitrate.

Instead of extensive hearings with live testimony, cross-examination, findings of fact and conclusions of law, which could take months and even years to complete, the arbitrator was limited to choosing one side’s or the other’s position on each issue to be decided. He could not make independent findings and conclusions.

In one interconnection arbitration, there were in excess of 50 issues to be decided. By the time hearing was held, it was down to 16 issues. During the course of the hearing the parties resolved ten more and six were left for decision. The parties briefed the issues, submitted their final positions, and the arbitrator selected one party’s position or the other on each issue. This was then reviewed by the Public Utilities Commission and the matter resolved. The matter was resolved in weeks rather than months or years and at considerably less cost.
plaintiff, for example, may feel, after hearing, that his demand is too high and lower it, and the defendant raises his offer. The intent of the process is to push the parties closer together so that they might just amicably settle the matter. 58

D. The Adversarial System Abused by Attorneys

Chief Justice Burger was quite concerned with lawyers who were the causes of conflict, not its healers. The adversarial system spawns such lawyers. They are lawyers who become so "mesmerized" by the process that settlement to them becomes a cop-out and only a courtroom trial can satisfy their craving. As one trial lawyer, opposed to mediation, stated:

  Trying cases is hard. It ruins lots of weekends and destroys lots of marriages. It is emotionally exhausting. It causes you to drink too much, smoke cigarettes, and sleep too little. So why do it? Because it’s what we do. It's fun. It’s rewarding. It’s important. And hearing a jury pronounce a good verdict for your client is magical.59

Case Study: The parents of a 6-year old boy sued a concrete mixer truck company for hitting the child and causing serious injuries. The child walked down an alley, and, when he reached the street, darted out into the street without looking for traffic. A driver behind the truck saw the child run into the street, but the defendant did not. Because he was driving 26 mph in the 30 mph speed zone, he might have avoided the accident altogether if he had been more alert.

At the time of the mediation, the child had had several operations on his left leg and had made a fairly good recovery. Another surgery was required when he was fully grown. At the mediation, plaintiff’s counsel demanded $1 million. The insurance carrier offered $300,000. At the end of the day, the carrier offered $500,000 and the parents wished to accept it. Counsel insisted they continue to prepare for trial. At trial the arbitrator lowered his demand to $800,000, but the carrier held firm. At the trial, counsel felt the jury was favorable and raised the demand back to $1 million.

A jury returned a defense verdict, which severely impacted on the family, because they had little resources to care properly for their son. For the lawyer it was just another trial, and he was ready to go on to his next case.

One Illinois lawyer stated:

[Mediation] is public enemy #1 for trial by jury.

How can a person call himself a lawyer if he doesn’t try lawsuits? Well, they don’t. Now they call themselves “litigators.” Litigators litigate, which means engaging in long, protracted expensive discovery with the aim of settling the case at mediation. Litigators are pretty easy to identify. Just check and see how many times they’ve been to verdict. Trust me, if you are a plaintiff’s lawyer, and you know the case is being defended by a litigator, your client will do just fine – at mediation. The converse is equally true. Plaintiff lawyers who don’t try cases consistently settle short.

Leaving the value of cases up to “ADR neutrals,” many of whom have never tried a case, is a perversion of the Seventh Amendment and a disservice to at least one of the parties, if not both.
Behind the mask of acting in the interest of their clients, such lawyers not infrequently push their clients to litigation when it is not in their best interest to do so, or push them to trial when there is a settlement offer on the table they might wish to accept, because it is not enough. In any settlement discussions, they are controlling and often will not let the clients speak. They’re quick to terminate settlement discussions unless the other side capitulates.

When successful these trial lawyers are prone to hold press conferences to further their reputations and garner more business, and they circulate among the profession the number of multimillion dollar verdicts received each year. For many, it is big business and not a healing profession. The adversarial system, as noted by Chief Justice Burger, gives these trial lawyers the tools to further their "magical" needs. Two such tools are of particular interest because they can become the vehicles of abuse: the contingency fee arrangement, and consumer class actions.

1. **Contingency fee cases.**

   Although contingency fee cases open the courts to many who would otherwise be denied justice, still, it has also opened the courts to serious abuse. Only in United States have contingency fee cases thrived. No other court system in the world, including Great Britain and Canada permit

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Thomas Q. Keefe, Jr., Trial Lawyers Should “Get Back in the Saddle.” Ibid.

60 *Case Study:* Plaintiff sued on behalf of his deceased wife’s estate for medical malpractice. The anesthesiologist failed to monitor her properly when giving birth to her first baby. The baby survived and was a healthy girl.

Plaintiff did not attend the mediation and the mediator was not permitted by counsel to even speak to him on the phone. The insurance carrier offered $700,000 to settle the matter and plaintiff’s counsel demanded $800,000, and said this was as far as he would go, “read my lips.” The insurance carrier offered to split the difference, but counsel without conferring with his client, refused and instead raised his demand to $1million. The case went to trial and the jury returned a verdict of $650,000. Costs of litigation for the plaintiff was another $30,000. Although plaintiff received less than offered, the real tragedy was that the carrier was prepared to place a portion of the settlement into a structured annuity, which would have provided ongoing income to plaintiff and the child for an indefinite period of time. Instead, he spent the entire recovery in two years, purchasing new cars for himself and girlfriend, and taking her on a trip to Paris. Counsel would not even consider a structured annuity although he recognized plaintiff was a good candidate for such.
contingency fee arrangements. Because a contingency fee can be as high as fifty percent, attorneys gain a substantial proprietary interest in the outcome. It is he that invests the time and advances the costs and expenses. For these reasons any settlement must accommodate his interests as well as the client’s. In advising the client, there is strong incentive to protect his investment first.\(^{61}\)

The contingency fee arrangement thrives in the adversarial environment in other ways. It facilitates attorneys to file high-risk cases with the hope of making a substantial recovery. The client consents because the entire risk is borne by the attorney.\(^{62}\) However, such cases can place a heavy

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\(^{61}\) **Case Study:** Plaintiff sued her husband for divorce. They reconciled and signed a postnuptial agreement which provided that if they should later divorce he would pay her $4 million and give her the house. Her attorney urged her not to sign but she did. Thereafter, she sued for divorce a second time and filed a declaratory judgment action to set aside the postnuptial agreement. She sought one-third of her husband’s $100 million estate. Again, they reconciled and the declaratory judgment action was by consent dismissed with prejudice. No appeal was taken. Eighteen months later, she filed again for divorce and this time it was granted. Getting new attorneys, she sued to have the postnuptial agreement set aside on the grounds that it was procured by fraud. The court ruled against her, but she declined to take an appeal because counsel told her she would have to pay her husband’s attorney’s fees, over $1 million, as provided in the postnuptial agreement. They were in error in that as a matter of law she would not have to pay her husband’s attorney’s fees. However, dismissal of the original declaratory judgment action with prejudice made the issue of fraud moot because of res judicata or claim preclusion.

At this point she hired a high risk plaintiff’s attorney to sue her prior attorneys for legal malpractice. He took the case on a contingency fee basis. He ran up the fees the defendants incurred to seven figures. With little likelihood of the success he filed numerous motions and appealed the trial court’s decision to dismiss the claim.

When a substantial six figure offer was made, counsel rejected it as an insult and demanded $3 million. As he explained it to the mediator, he had nothing to lose because it had a good year, and he could easily finance the case. He was not concerned because if he won, the rewards would be great.

\(^{62}\) **Case Study:** Plaintiff, a food distributor, sued a competing distributor and the purchasing agent for a number of school districts. The complaint alleged that defendant food distributor conspired with the purchasing agent to rig the bidding process so that it would receive the contract to supply food products to school cafeterias. It alleged violations of § 1 of the Sherman Act, which provided treble damages and costs and attorneys fees.

At the mediation, the mediator, with a background in antitrust law, pointed out that there was little likelihood of success on the merits because the conspiracy was vertical and the impact on the market insufficient to trigger an antitrust violation. However, the case still settled for $1.65 million because of the costs that would be incurred going forward.

The defendant food distributor paid $1 million even though liability was highly questionable. Defense counsel told its client it would cost $2 million to $3 million to defend. Therefore, $1 million seemed like a bargain.

The purchasing agent’s insurance carrier paid $650,000 because it would spend at least $750,000 or more to defend. The purchasing agent had a million-dollar insurance policy. It was a withering policy in that attorneys fee and costs as incurred reduced the coverage amount. At the time of the mediation, $250,000 had been spent,
financial burden on the defendant, who must defend. Even if they win on the merits, they have lost in terms of time, costs and emotional stress. The strategy of such attorneys is to run costs as high as possible thereby forcing capitulation in what might otherwise be a meritless case.\footnote{Case Study: The abuse that can occur in the adversarial system caused by the contingency fee arrangement is illustrated in a case filed by a workman who lost his hand in an industrial accident. He sued the manufacturer of the machine he was working on. As he was working, a problem arose involving the inner workings of the machine. A plate in the front of the machine was to be opened to reach the interior. When the plate was opened, it automatically shut down the machine. Instead of using this means to reach the source of the problem, he went to the rear of the machine and removed a plate that had been bolted on, which did not shut off the machine. He then reached inside in an effort to correct the problem and lost his hand.}

Contingency fee lawyers take great pride in the number of multimillion dollar cases they have won, and often publicize the fact to the public. Indeed, contingency fee arrangements combined with the jury factor, is a major drain on the American economy and place a heavy financial burden on the business community and insurance industry. And the adversarial system nurtures both.\footnote{The amount of attorneys fee awarded is dependent upon the complexity of the matter, the different court steps taken to resolve the matter, the amount of money involved, and, in some cases the conduct of the parties. See, \url{http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/168_2009_05}; \url{http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/169_2009_05}; \url{http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/168_2009_06}.}

As long as lawyers have no accountability in contingency fee cases, they will prosecute even minimally viable actions with the hope of succeeding before a jury. It is here suggested that the Canadian model might be considered to curb these abuses. The rule is that costs follow the event: thus, if plaintiff wins, he or she is entitled to taxable costs and disbursements from the defendant. If defendant succeeds and plaintiff’s case is dismissed, defendant is entitled to its costs and disbursements paid by the plaintiff. Under this system taxable costs include between one-third one-half of the actual reducing coverage to $750,000. Because the entire amount and more would be spent defending, the carrier agreed to pay $650,000 to settle the claim. This at least saved $100,000 that would have otherwise been spent if there had not been a settlement.
legal expenses. There is, however, a further check on plaintiffs pursuing frivolous lawsuits. A defendant can make a formal offer to settle and if not accepted and the result at trial is less than the offer to settle, the court can award taxable costs against the plaintiff even if the latter is successful at trial.

2. **Consumer class action.**

Another area of abuse is the filing of consumer class actions, which are always taken on a contingency fee basis. This is a lawsuit which belongs entirely to the lawyer inasmuch as the complaining party has a very minimal stake in the outcome. However, the costs of defense can be excessive because of the potential size of the class. Even litigating the issue of class certification can be costly. Therefore, great pressure is placed on the defendant to settle if the opportunity arises, regardless of the merits of the claim.

What makes consumer class action so imposing is the defendant can never be certain as to the size of the class. Under Rule 23 of the Federal Rules of Civil Procedure, if the class action is certified the best notice possible under circumstances is made to identify the class. All potential class members remain in the class unless they affirmatively opt out. Many receiving such notice do nothing feeling they do not want to be involved, and yet such inaction makes them viable class members.

A defendant in a consumer class action is faced with a Hopkins choice. It either succumbs to the pressure to settle for a substantial amount to satisfy class status, or spend inordinate amounts of money.

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65 **Case Study:** In the federal court action referred to in footnote 62, separate attorneys filed a class action in state court, seeking to represent the parents of children purchasing the food products in question in their respective schools cafeterias. They filed in state court for two reasons: one, the case could not be combined with the case in chief filed in federal court; and, two, state rules concerning class certification were considerably more liberal than the federal rules.

Counsel did very little while motions to dismiss and summary judgment were litigated in the primary action. They then relied on several favorable rulings. When the federal action was settled, counsel went forward with its motions for class certification. They took some discovery and briefing for an interlocutory appeal, which ran up the cost of defending. Recognizing that defense costs would only escalate, defendant offered to settle for $500,000. The attorneys rejected this as an insult and demanded $17 million. Counsel observed they had had a good year and therefore could afford to bear the time, risks and costs of proceeding ahead. The possibility of a large return made to gamble worthwhile.
defending and facing that one in ten chance of losing all. A losing defendant not only faces substantial damages but the costs of notice to the class, a substantial cost in itself. Plaintiff’s counsel, on the other hand, risks nothing but their time and costs incurred to prosecute the action.

There is, however, an even greater potential for abuse. There are lawyers who shop for class actions, reviewing cases that have already been filed. If the plaintiff in such a case has not made a claim for class action status, their modus operandi is to "piggyback" the action and file a separate class action. They then sit back and permit counsel in the primary action prosecute the case and then assert their class-action status. They even delay seeking class certification as long as they can. They generally file in state court which in many states has more liberal class-action rules than federal court. Such plaintiffs’ counsel risk little except their time and costs and yet they put defendants to great expense in defending.

E. Trial in the Courtroom is All Out War

Under the adversarial system, the filing of an action in the courtroom signals all out war. It immediately is taken as a threat to the other side and puts them on the defensive. Just the pleadings can have a serious emotional impact, particularly when they plead fraud, RICO and antitrust violations. Protected by privilege, lawyers can plead most anything they wish just to get the other side’s attention. When such pleadings prove frivolous, there is little room for sanctions or other measures to curb such excesses. And, in any event, the emotional damage is done. Additionally, in discovery the adversarial system permits the lawyer to engage in such excesses as seeking contempt orders or sanctions, which further embroils the parties in battle.

There is another side to the courtroom battle, and that is the impact it has on the attorneys. Many attorneys preparing for trial will prime themselves by finding reasons to dislike opposing counsel,

66 Case Study: Husband and wife agreed to get divorced. Before lawyers were retained, they amicably resolved many differences. After the lawyers were retained and depositions taken, the husband said he gained a hatred for his wife and her attorney he did not think possible. And the wife, after deposition, explained that her husband’s attorney made her feel like an alcoholic, harlot, a person of no value and not worthy of consideration. She ended up in the hospital with clinical depression.
or convince themselves the party opponent is prevaricating. The system turns lawyer against lawyer, the plaintiffs’ bar against the defense bar.

F. Lawyers Required to Make Life Decisions for Their Clients

Another concern Chief Justice Burger had with the adversarial system is that it cannot accommodate attorneys who mistakenly advise their clients to file suit, or reject an offer to settle when it is in their best interest to do so. Wrong advice can have dire consequences for the client because the system does not accommodate losers. The system is a difficult taskmaster to those who fail.

Mediation does not have such dire consequences. First, the decision to settle is placed squarely in the hands of the parties. It is their decision alone as to whether they should resolve their differences or send the case back to the courts. And they make their decision after hours of careful negotiations.

Second, in making the decision to settle, the parties have the benefit of the third-party mediator, who is impartial in the matter and can provide a fresh look at the proposals and their consequences.

Third, the mediator is often in a better position than counsel to assist the parties because he or she is not burdened by the albatross of advocacy. The mediator sees the case through a different prism.

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67 In the case study discussed at note 8, supra, counsel examining the case recommended that it be filed against an international conglomerate, which was interfering with the contractual rights plaintiff had with its established distributors. The plaintiff sought $8 million in damages. Counsel could not have anticipated that the conglomerate would file an antitrust counterclaim, claiming a total of $500 million in damages. The mere filing of the counterclaim threatened the very viability of the plaintiff. Its stocks went down and future plans were put on hold pending the outcome of the case.

To respond to the counterclaim, high-priced antitrust trial lawyers were retained as well as experts in the law, and a real battle ensued. When pretrial discovery was completed, plaintiff had spent many times the $8 million it was seeking by way of damages. Although it settled the second week of trial through mediation with no money being exchanged, the case was an expensive disaster for the plaintiff.

More revealing was the fact that the federal district judge, on the eve of trial, indicated to the mediator that he was close to dismissing both the claim and counterclaim on the grounds that neither were viable.
than counsel and can often identify problems counsel may be overlooking or not evaluating properly.\textsuperscript{68}

Additionally, the mediator is not just another attorney, but a person trained in the art of settlement.

For the lawyer, a wrong decision means he or she will simply go on to the next case. For the client, it could have lifelong consequences.

G. The Adversarial System Facilitates Vindictive Conduct

Associate United States Supreme Court Justice Antonin Scalia expressed grave concern, as noted above, that the American system of justice permits Americans to seek "vindication or vengeance through adversarial proceedings rather than peace through mediation."\textsuperscript{69} By the very nature of the system, it facilitates parties and counsel to engage in vindictive conduct. The large business entity with unlimited resources has a decided advantage over its small competitor, which may have limited means to finance litigation. With extended and expensive discovery, the smaller entity may be forced to capitulate for lack of funds, regardless of the merits. For example, a manufacturer may commence a

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\textit{Case Study:} Plaintiff, a first officer flying international routes, was in a car accident driving home from the airport. She was concerned about the accident in that it might interfere with her goal of reaching captain, which few women had so far achieved.

At the mediation, she made unrealistic demands and the mediator was having difficulty getting her to compromise. In one caucus, her attorney produced a number of documents, which were about to be turned over to the defendant. The mediator discovered one which entirely changed the complexion of the case. In fact it seriously jeopardized her continuing employment with the airlines.

The document, the mediator noted, which counsel had overlooked, was the semiannual medical report pilots must file to fly. It was filled out shortly after the accident. In various boxes, plaintiff checked “no” to such questions as, “frequent or severe headaches,” “neurological disorder,” “other illness, disability, or surgery,” “significant medical history,” “abnormal physical findings.” She also checked “normal” for the following: “head, face, neck and scalp,” “upper and lower extremities (strength and range of motion).” What she marked contradicted what she was alleging in her lawsuit. If her medical report was correct, she had no lawsuit. If it was false, she was subject to felony charges and loss of her pilot’s license. A notice appeared on the first page of the report. It stated: “\textit{NOTICE – Whoever in any matter within any jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or devise a material fact, or who makes any false, fictitious, or fraudulent statements or representations, or entry, may be fined up to $250,000 or imprisoned not more than five years or both.” (18 U.S. Code Sec. 1001-3571) When this was pointed out, the case quickly settled. Filing the complaint, a public record, risked the FAA picking it up and taking action.

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68 \textit{Case Study:} Plaintiff, a first officer flying international routes, was in a car accident driving home from the airport. She was concerned about the accident in that it might interfere with her goal of reaching captain, which few women had so far achieved.

69 See, supra. f.n. 16.
declaratory judgment action to terminate a distributor. It may then use the lawsuit not only to terminate the distributor, but run it out of business and make it an example to other distributors.\textsuperscript{70}

And in family law matters, lawyers not infrequently allow themselves to be used by clients, particularly in divorce, to brutalize the opposing spouse. Because the system places divorce and family issues in the hands of the adversarial system, it subtly accommodates such abuse.

Certainly, the U.S. Government has a decided advantage over most entities it might sue. The mere threat of extensive discovery and other litigation costs may thwart any attempt to defend. The only option is to capitulate on government terms. Only the Microsos of the nation can adequately defend and then at a heavy price.

H. The Adversarial System Negatively Impacts on Lawyers Participating in It

A final concern Chief Justice Burger had with the adversarial system was how it impacted lawyers engaged in it. Students graduating from law schools do so with the highest expectations and motives to fulfill the inspiring admonition of the Chief Justice: "The obligation of your profession is to serve as healers of human conflict."\textsuperscript{71} However, something happens when they actually enter the practice. They quickly learn that the system is a difficult taskmaster, that billings are the measure of their worth, that to make the tenure track they must work evenings and weekends, and that in large firms their greatest competition for partner are those who were hired at the same time. They are praised for their slavish work habits and instilled with the win-at-all-costs mentality.

\textsuperscript{70} Case Study: A large manufacturer commenced a declaratory judgment action terminating a distributor, which was seeking damages for breach of its distributor agreement. The distributor's claim was meritorious. After 10 years of costly litigation, the distributorship simply ran out of money and faced bankruptcy. All it's savings and profits were put in to the litigation. It then offered to settle its claim for fair figure and agreed to terminate its distributorship, which the manufacturer was asking in the first place. The latter would not accede to its request. It wanted to bankrupt the distributorship to make it an example to other distributors that might have views contrary to the best interests of the manufacturer. Out of emotional and financial exhaustion, the distributorship capitulated all grounds and went out of business. The adversarial system accommodates such motives.

Seasoned trial lawyers, conditioned to the adversarial system, find it mesmerizing, addictive and all-absorbing. They become servants rather than masters. Alcoholism, drug addiction, health problems become a way of life. Certainly, they must become more aggressive and less concerned with the adverse impact they are having on the lives of others. This is required just to survive.

In mediation, the lawyer's role and lifestyle are quite different. As the Chief Justice stated, lawyers must be "problem solvers" rather than adversaries, "harmonizers" rather than victors, "peacemakers" rather than in impeachers, and "healers" rather than those who burden others. Indeed, lawyers are required to work with each other and not against. Their goal is collective not singular. The challenge is to be creative for the common good. They must work in harmony with the mediator to find resolution that can lift the albatross burdening their clients. When all is said and done, they must have a very different mindset from the advocate.72

This may seem a harsh assessment of the adversarial system and the advocates role in it. Yet, this is the system Chief Justice Burger was bringing to task because he was critically concerned with what the system was spawning. He espoused mediation and the many benefits derived therefrom, not the least of which is the benefit to the practitioner personally. "Victory" has a very different definition in mediation. It spells peace and conciliation for the client, and a sense of satisfaction and accomplishment for the lawyer. As Abraham Lincoln stated: "As peacemaker, the lawyer has a superior opportunity of being a good man;" indeed, mediation has made the legal profession a noble one.

This is not to imply that Chief Justice Burger was suggesting we abandon the adversarial system. It clearly serves an important function when all else fails. More important, the court can play an adjunct


It should be noted that not all mediators are peacemakers. Some, particularly ex judges, prefer to play “devil’s advocate” and confront parties and counsel and put them on the defensive. This limits their capacity to be problem-solvers, harmonizers and healers. Certainly, Chief Justice Burger was espousing the highest level of lawyering that redefines the practice of law as a noble profession.
role in mediation, supervising discovery and clearing the air of legal issues through summary judgments and interlocutory repeals.

IV. CRITICS OF CHIEF JUSTICE BURGER’S CALL TO MEDIATION

Of course, many arguments have been raised attacking Chief Justice Burger’s clarion call to mediation. With the dramatic decline in courtroom trials, particularly in federal courts, detractors have tried to make mediation the whipping post for the court’s failings in the dispute resolution marketplace.\(^7\) It should first be noted that mediation is not the only reason for the decline in courtroom trials. There are a number of factors coming into play, including action taken by the courts themselves, disposing of cases by summary judgment, resolving disputes by arbitration, and action taken by Congress and state legislatures to implement mediation.\(^7\) However, detractors raise a number of concerns with cases being resolved outside the courtroom.

\(^7\) Mediation has been described as a process designed to bypass the courts and undermine our jury system. See, e.g. Owen M. Fiss, Against Settlement, 93 YALE L. J. 1073 (1984); Eric K. Yamamoto, ADR: Where Have the Critics Gone? 36 SANTA CLARA L. REV. 1055 (1996). There have been expressions of concern that mediation undermines the rights of women in family law disputes. See, Trina Grillo, The Mediation Alternative Process Dangerous For Women, YALE L. J. 1545 (1991). Others have expressed concern that the informality of ADR fosters racial and ethnic prejudices. See, Richard Delicado, Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution, 1985 WISC. L. REV. 1359 (1985).

One federal judge stated:

I’m quite surprised that an organization composed of lawyers [Iowa Bar Association] would be pleased that the primary tool used to resolve disputes since the founding of our country is declining and furthermore the decline is “impressive.” In fact it is a compelling matter that all people who care about our country and its laws should be shocked about. It is important to remember that the Seventh Amendment to the U.S. Constitution and the entitlement amendment to the Iowa Constitution are binding on all branches of the government.


\(^7\) The courts themselves have contributed significantly to the decline in courtroom trials. First, judges have long encouraged parties to settle before trial, and a large percentage do settle at the negotiation stage. More recently judges and magistrates have provided settlement conferences and even mediation services. Also, through pretrial procedures, courts are playing an adjunct role to mediation by ruling on various motions in streamlining the pleadings. Professor John Lande stated: “Court have taken on the role of case managers in addition to adjudicating the odd cases that do not settle before trial, ruling on pretrial motions and providing substantive and
1. **Undermining the jury system.**

A primary argument is that mediation undermines our jury system which, according to one federal judge, "is the purest form of democracy known to our land." See, John Lande, *Shifting the Focus from the Myth of the “Vanishing Trial” to Complex Conflict Management Systems or I Learned Almost Everything I Need to Know About Conflict Resolution from Mark Gallanter*, 6 CARDOZO J. OF CONFLICT RESOL. 191, 202 (2006). According to Professor Lande, a major function of courts today is not to try cases, but to help parties "bargain in the shadow of the law." See, also, Robert H. Mnookin and Lewis Kornhauser, *Bargaining in the Shadow of the Law: the Case of Divorce*, 88 YALE L. J. 950, 968-69 (1979).

Second, both federal and state courts have become far less reluctant to dispose of cases by summary judgment and motions to dismiss. In federal courts, for example, disposition of cases by summary judgment just 25 years ago was only a fraction of cases going to trial, whereas today it "is a magnitude several times greater than the number by trial" See, Marc Gallanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL STUD. 459, 484 (2004).


Third, a major cause for the decline in courtroom trials is the fact that certain areas of dispute have been removed from the courts entirely and resolved through arbitration. Disputes in the brokerage industry are now resolved primarily through arbitration as required by agreements between broker and customer. Likewise, credit card issuers and their customers and utility companies and the rate payers are required to arbitrate pursuant to agreement. See, Gilmer v. Interstate/Johnson Ln. Corp., 500 U.S. 20 (1991).

Fourth, even Congress and state legislatures have impacted on the decrease in courtroom trials. In federal courts, the Alternative Dispute Resolution Act of 1998, mandates that each federal district adopt local rules, implementing its own ADR program. See, 28 U.S.C. § 651(b) (2001). A number of federal Courts of Appeals require pending appeals to go to mediation before they will be heard. See, ROBERT J. NIEMI, MEDIATION AND CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS, 61-77 the Fed. Judicial Ctr. 2d (2006).


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75 Mark A. Bennett, United States District Court Judge, Northern District of Iowa, letter on file, July 20, 2010.
Justice Burger expressed no concern that mediation might impact on jury trials. In fact, he did not even address the question, although he must have been aware of its implications.

Although a jury trial was important during the early years of our Republic, it is not so sacrosanct today that it cannot be challenged. For the most part the jury trial has been abandoned throughout the world except in the United States, Louisiana being the exception. One federal judge, lamenting the decline in jury trials, suggests that, "Judges gain their legitimacy as decision-makers from juries, not the other way around." 

It is contended that juries give predictability for future guidance and assurance that an outcome will be fair. However, on both counts juries have failed to live up to their billings: they neither forecast a result for further reference, nor give parties any assurance whatever that a fair and objective result will be reached. On the contrary, they have become an unknown factor, a roll the dice with no great predictability or reliability, which undermines the credibility of the adversarial system itself. In fact, mediators use this unpredictability to encourage parties to compromise and settle.

The reason juries today are unpredictable and uncertain is because they are vulnerable to many outside influences never envisioned by the framers of United States Constitution. First, jurors are screened in voir dire by the lawyers and judges. Parties even retain professional jury experts to help in

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76 The Founding Fathers looked to England for including trial by jury in the Bill of Rights (Sixth Amendment — criminal cases, Seventh Amendment — civil cases) to the U.S. Constitution. It was a protection against the arbitrariness of judges appointed by the crown. The English experience was that the jury acted as an essential countervailing force against tyranny of the Crown. William Blackstone wrote, that it was “the most transcendental privilege which any subject can enjoy, or wish for, that he cannot be affected either by his property, his liberty, or his person, but with the unanimous consent of 12 of his neighbors and equals.” 3 William Blackstone, Commentaries on the Law of England 379 (1765).

By 1936, jury trials in England and Wales where for the most part abandoned entirely with the enactment of the Administration of Justice (Miscellaneous Provision) Act. Confidence in the impartiality of judges made them unnecessary.

77 Robert W. Pratt, United States District Judge, Southern District of Iowa, August 18, 2010 (letter on file).
profiling jurors to assure the party has a favorable panel. Many times the outcome of the case may hinge on who did the better profiling and not the merits of the case.

Second, campaigns by insurance companies threatening to raise insurance rates if "frivolous" lawsuits continue to be filed, impacts on jury decisions. High profile cases such as the McDonald’s case, where the plaintiff was awarded $3 million for spilling a cup of hot coffee while driving, likewise influences juries to be more conservative.

Third, the media has also impacted juries and their decision-making function. Most jurors have watched television shows, such as Judge Judy, and feel they have a good understanding of what to expect.

Fourth, it has been demonstrated that jurors are prone to decide cases based on PEOPLE, they like and dislike, rather than the facts or law. They will help those they like and punish those they dislike, regardless of the merits.

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78 Attorney H. Case Ellis has made a twelve-year study of jury verdicts and the reasons that motivate jurors. See H. Case Ellis, The Docket, The Official Publication of the Lake County Bar Association, Sept. 2007, Vol. XIV, no. 9, pp. 23-33. His conclusions are revealing. First, jurors are more concerned about the parties than the issues being tried. To jurors, "this is a contest between two or more PEOPLE. What matters most to them are whom they like and whom they dislike! The really tough deliberations occurred when they liked everybody and they had to rationalize hurting one of them or struggle to compromise enough that they upset neither."

Second, jurors are prone to help a party when they feel counsel is incompetent, especially when they like the party. In one case the jury "felt sorry for this clearly negligent defendant because he was remorseful and his attorney had been so incompetent that the defendant must have been worried throughout the trial by his defense lawyer's conduct."

In another case, the jury helped a woman whose attorney, the jury determined, was unqualified to handle the trial. "They took it upon themselves to protect the woman and awarded her more than her lawyer had requested."

Third, juries are subject to agenda jurors, that is, a juror who has ulterior motives and seeks to steer the jury to a specific result which will make a statement of some sort that transcends the specific case being presented.

Fourth, the jury system is prone to the occasional case where the jury awards an excessive amount that surpasses anything that is reasonable, the so-called “run-away jury.”

Fifth, the influence of lawyer or judge television, such as “Judge Judy,” should not be underestimated. Mr. Ellis noted, “I never bring up the subject of television in my interviews, but more than half of the interviewees will reference either a law serial or a ‘judge’ show as proof that they have some experience with ‘what’s going on in the courtroom.’”

Sixth, one of the most serious concerns with jurors is their use of the internet to bring in matters outside the courtroom. In the very public trial of Governor Ryan of Illinois, for example, one of the jurors actually printed out Illinois case decisions from the internet and threatened another juror by citing those cases.
Fifth, jurors are greatly influenced by the attorneys appearing before them. To a degree, trial lawyers must be actors. Considerable continuing legal education classes address how best to influence the jury. And much time is spent learning how to be an effective attorney.

Taking the above into consideration, it is difficult to support the proposition, as one federal judge stated, that "the true value of cases is best set by peer juries." It is belied by the fact that no one can predict what a jury will do. Lawyers point out they lose cases they should win, and when cases they should lose. Indeed, it is the unpredictability of jurors which lawyers and parties must weigh in deciding whether to settle at mediation. Mediator's use this as one of their settlement arrows to encourage parties to settle.

2. Lack of trials undermine the appellate process.

Detractors contend that mediation is undermining the development and evolution of law, which a vibrant society requires. With fewer cases going to trial, fewer are candidates for appeal. Thus, one of the courts main functions, to meet the changing needs of society, is abrogated. As one scholar stated: "Ultimately, the paucity of contemporary judicial decisions supplying and enforcing the norms of law may lead to a blurring and weakening of the authority of law itself."

It is true that the more parties turn to mediation the greater could be the impact on the law. Certainly, Chief Judge Burger appreciated this and yet his prognosis was still severe. It was that the

Seventh, the adverse publicity issuing from insurance companies and big business has impacted jurors. Mr. Ellis stated, that in “the last three years . . . it is rare that I speak to a juror who does not at least mention that ‘I am aware of all the frivolous lawsuits,’ at some time during our interview. I believe the anti-litigation message of big business and the insurance industry is finally starting to get to the jury pool . . . . This may be today’s greatest challenge for plaintiffs’ attorneys.” H. Case Ellis, Whose Peers Are These?

Mark A. Bennett, United States District Judge, Northern District of Iowa, July 20, 2010 (letter on file).

Case Study: An insurance claims office mediated a number of cases successfully over several years. It saved its carrier significant amounts of money. When a medical malpractice case came across its desk, which could have been settled for $250,000, the office decided to defend. The jury returned a verdict of $4.5 million, to the utter consternation of the office. The consequences to the office were serious. The office manager was transferred to a lower paying job, and the adjuster in question was released for “other causes.”

adversarial system will no longer be adequate; it will go the way of ancient trial by "battle and blood."

In making his prognosis he did not express concern about the possible impact this would have on appeals. He advocated for what he considered to be in the best interest of the citizenry. He balanced the need for appeals with the benefits to society.

However, upon closer examination, the consequences of mediation may not be as severe as naysayers might contend. Consider the following: First, many appeals will continue to be generated by motions to dismiss and summary judgment. Generally, when interlocutory appeals are certified at both the federal and state levels, they involve significant questions of law. Mediation should not significantly deter such appeals and, in fact, should work hand-in-hand with judges considering them. Many times parties will not seriously consider mediation until avenues of appeal have been exhausted or questioned areas of law clarified.

Second, there will always be those cases which cannot be settled that will have to be tried. Those involving important legal questions will likely reach the appellate courts. Cases involving class actions and novel causes of action, for example, are fertile grounds for appeal.

Third, there will still be actions in equity that call for relief other than the money damages. Appeals from lower court rulings will remain a source of review by higher courts. Although mediation can address questions of equitable relief, most mediations rise out of actions of law.

Fourth, parties will still resort to three-judge federal district courts to resolve important questions of federal constitutional law.

Fifth, most family law matters must be submitted to courts for review and approval even when there has been a successful mediation. Thus, they also can trigger appeals.

Six, appeals in criminal cases are not impacted by civil mediation. Thus, they provide a rich source of evolving law and will continue to do so.
3. **Mediation is the tool of big business and insurance carriers.**

It is next contended that mediation is the tool of big business and insurance carriers. It is true that initially insurance carriers pushed mediation to save money, and that plaintiff's counsel were concerned that big business was pushing plaintiffs to settlements counsel felt were inadequate or not what a jury would award. However, as plaintiff's counsel became familiar with the process, they realized it benefited them in several ways: one, they many times settled their cases even before filing, which saved them time and money; two, settlements were often higher than what they might expect if they went to trial; third, mediation was more expeditious, often settling in one day and not months or years after filing; and, fourth, they found that the clients were happier with the process.

Opposition today to mediate comes from the defense bar. It is a problem of raw economics. If a case can be settled before it is filed and pretrial discovery commenced, the losers are defense attorneys, who are deprived of their customary billings. For some defense firms, this has caused great dislocation and even implosion. Like the courts, they must adjust.

4. **Eroding lawyer trial skills.**

Another criticism of detractors is that mediation has the effect of eroding lawyer skills. Graduates from law schools now have less opportunity to gain trial skills before taking over from retiring trial lawyers. This has double-barreled implications: one, they are ill-prepared when required to go to trial, and, two, they have little practical experience to advise clients on the settlement values of cases. There is another concern and that is lawyers "are now afraid to try cases so they mediate." Many

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82 One venue, Polk County, Iowa, kept a record of all verdicts for a ten-year period. What it found was that 40% of the cases tried were defense verdicts, and 70% were $25,000 or less (including the defense verdicts). The author has mediated over 2000 cases and kept track of those cases which were not settled and went to trial. He found that the defense verdicts were about the same percentage as the Polk County experience, 40%. However, in each case that went to trial that resulted in a defense verdict, a substantial offer had been made by the defendant. See, Diane Cox, Polk County Jury Verdicts: Jury Verdicts from August 1993 to June 2002 (2002). [http://www.drake.law.edu/library/docs.polcountyjuryverdicts.pdf](http://www.drake.law.edu/library/docs.polcountyjuryverdicts.pdf).

83 Mark A. Bennett, United States District Judge, Northern District of Iowa, July 20, 2010 (letter on file).
times they will exhaust pretrial discovery and collect their fees and then depend on a mediator to resolve their cases. In other words, mediation is prostituting the practice of law.

Again, Chief Justice Burger seemed little concerned with this issue. The competency of lawyers engaged in the adversarial system was of little moment to him. He was redefining the lawyers role entirely, in very different nonadversarial terms. As noted he was directing lawyers to be problem-solvers, harmonizers and peacemakers, the healers – not the promoters – of conflict.

5. Mediators lack legal training to mediate effectively.

Detractors not only note the declining skill of trial lawyers but express concern of the competency of mediators to settle cases. One federal judge stated, that

I do not believe mediators who have not tried 50 or more jury trials know the true value of a good settlement which was okay when we had a generation of lawyers who did try cases and know their value but used mediators to help the parties reach a mutually satisfactory resolution. Good mediators today only know the value of a good "mediated" settlement which is a very different measure. Now we have "litigators" who never even tried a case or haven't tried one in 20 years mediating cases with mediators who have never tried a case.84

Although this concern has some merit at first blush, still it perhaps misunderstands the true role of the mediator. If the mediator has been asked to be evaluative, that is determine what value of the case is based on the facts and law, the comments are appropriate. Such a mediator must have extensive trial experience as a litigator or judge. However, if the mediator is asked to be facilitative, that is, help the parties reach a resolution they can accept, their trial skills are of little moment. What is required are skills to bring the parties together, to find common ground, skills which suggest creative ways to resolve impediments to resolution.

The mediator who is facilitative, which most mediators are, is only marginally concerned with the value of the case before the trier of fact. He or she seeks a resolution both parties can accept for whatever reasons. It is a needs-based and not result driven. If a party is insolvent and needs cash now

84 Ibid.
and cannot wait the two or three years required to litigate, that person will compromise and take less to satisfy this need. Or if a defendant is facing insolvency, it might agree to a settlement unrelated to the value of the case, if payments can be spread out over a period of months or years. The mediator can meet these needs and his or her litigation skills are irrelevant.

Chief Justice Burger made clear that the skills of a mediator are not litigation oriented. They are peacemaker oriented.

6. Mediators vulnerable to repeat players.

Detractors point out that mediators are vulnerable to repeat players, big business and insurance companies, who can provide a stream of business. The argument is that mediators will favor them in order to assure a continuing flow of income. One scholar states:

Mediators are under the same pressure as arbitrators to produce results that are acceptable to the repeat players. Mediators know the large repeat players such as insurance companies will not refer cases to mediators who failed to produce acceptable settlements. By the same token, mediators who are able to convince individual claimants to reach agreements favorable to the repeat players can expect repeat business.\(^85\)

This line of argument is belied by the following: first, ethics of the mediator require he remain neutral and impartial. Model Standards of Conduct for mediators provide:

\textbf{STANDARD II. IMPARTIALITY}

A. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias, or prejudice.\(^86\)

Any departure from the standard is an ethical violation. Like all lawyers, mediators must abide by the code of their profession.

\(^{85}\) Peter L. Murray, The Privatization of Civil Justice, 91 JUDICATURE 272, 276 (2008). Professor Murray also states: The problem with private ADR services is that they are private. Private actors will always act to maximize their well-being under whatever system they function The private ADR system under which decision-makers are paid on a case-by-case basis eventually tends to reward those who satisfy the repeat players to the detriment of objective merit.

\(^{86}\) Model Standards of Conduct of Mediators, Standard II. IMPARTIALITY.
Second, in most mediations, parties are represented by counsel. Counsel has responsibility of checking any overreaching by the mediator in the interest of the client. If there has been overreaching, a party can reject the proposed settlement and go to trial. There's always an out.87

Third, probably the most important check on mediators is that if they get the reputation of being insurance industry mediators, for example, they will be blackballed by the plaintiff bar. Because all parties must approve the mediator, the objection of any will foreclose the mediator from participating.

7. Confidentiality in mediation shields mediator abuse.

Finally, detractors contend that because mediations are settlement conferences that are conducted in a confidential setting, they therefore lose the benefit and transparency of a public trial. This makes parties vulnerable to overreaching of the attorneys and mediator. Further, there can be no review as to whether a settlement is fair or in the best interests of the parties.

It is true mediations are conducted in a confidential setting. And in caucus format mediation, ex parte communications are the hallmark of the process. However, this is what makes mediation so successful because the mediator is positioned to craft a settlement to meet immediate and sometimes confidential needs of the parties. It is the element of confidentiality which assists in uncovering hidden agendas of the parties. It is confidentiality which permits the mediator to explore the weaknesses and

87 Pressure to produce results favorable to the repeat player is more aptly directed to arbitration. Here, the party losing has no outlet. He or she is bound by the award. And the arbitrator knows that an adverse decision given to a repeat player will result in few arbitrations, if any.

As Professor Murray states:

An arbitrator considering a case with one party who will likely never have further arbitration, and another, who will likely have future cases to refer, is subject to a direct economic inducement to decide the case in a manner so as not to drive potential future business away.

Parties whose business activities are likely to generate future referrals inevitably and invisibly, without saying a word, influence our arbitral organizations and individual arbitrators to render decisions that will encourage them to refer this future business.

concerns on both sides so that a compromise resolution can be developed. And it is confidentiality which permits the parties to vent without offending the other, thereby beginning the healing process.

The fact that a settlement cannot be reviewed by a higher court is a non sequitur. Parties often settle for reasons other than objective merit, such as financial weakness, delay, or risk aversion. But these same considerations play in any negotiated settlement. If a party must compromise for whatever reason, it makes no difference if postured as a pending lawsuit or mediation; they will settle.

To argue that mediation denies the right to review is to misunderstand the process. Parties are not compelled to settle but do so because it is in their best interest. What is “fair” measured by courtroom standards is not the measure of “fairness” in a settlement. The latter considers so many other factors which are irrelevant to the courtroom contest. What may be “fair” in the courtroom may be unfair in a mediation, because needs and interests of the parties are not met. And what is fair in mediation may not track with what the facts and law dictate.

Review of settlement agreements, except as required in family matters, is impractical, for how can you measure nonmonetary considerations, often driven by emotion and a need for resolution. Review would require an appellate court to measure the motivation and needs of the parties as well as the dollar amount. This makes any review process unmanageable and unrealistic.

CONCLUSION

This assessment of the adversarial system is not to suggest it should be abandoned. It does suggest that lawyers should use every means possible to resolve differences short of trial because that is the kinder and gentler way to resolve differences. If a sincere effort has been made and resolution is unobtainable, then the courts become a last resort, the last alternative.

Even within the mediation spectrum, courts play a major function. Many times legal questions must be tested before the air is cleared to discuss settlement possibilities. Courts through motions to dismiss and summary judgment and interlocutory and final appeals provide this avenue.
Modern day mediation is new and has taken the nation’s courts by storm. It needs time to shed its newness and find an equilibrium with the courts. One thing is clear, it has raised the public’s perception of the legal profession to new heights. It has given it the aura of nobility reserved for the healing professions. It is making the legal profession a noble calling.