IS MEDIATION THE BEST WAY TO RESOLVE CASES IN LITIGATION?

BY NIGEL WRIGHT

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This paper addresses the negotiation techniques most commonly adopted in both two-party and mediator assisted settlement negotiations, in order to determine whether, and why, mediator assisted settlement discussions provide parties with a measurably better outcome.

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    a)Positional bargaining,
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Introduction

Mediators believe that mediation offers the best vehicle for the resolution of litigated cases and have written many articles extolling the virtues of mediation[1] over direct negotiation between the parties. However, despite this effort, the vast majority of litigated cases are settled without mediation, which raises the question whether mediation really is the answer, and if it is, why parties don't use it more often?

Implicit in the title of this paper is that the parties can agree what constitutes a better resolution. Is it quicker resolution, more money, less money, more information, focused information (less information), simply cost savings, confidentiality, the resolution of the dispute as a goal, or is it certainty in the outcome, as compared with a trial and verdict?

This paper provides an overview of the common negotiation techniques adopted in litigated cases and the impact of the insertion of a mediator into those negotiations.

To answer these questions, the parties to litigation must first ask what they are seeking to achieve and what method is best suited for that purpose.

Why Do Most Litigated Cases Resolve Without Mediation?

As the vast majority of litigation cases are settled[2] prior to trial, without the use of mediation, it is worth considering why parties eschew mediation in most cases, despite judicial pressure including provisions in state bar professionalism guidance asking lawyers to consider alternative dispute resolution avenues[3].

Not every case is complex. For straightforward matters, where, costs may be disproportionate to the amount in issue, and values are easy to establish, a mediation can be a waste of time of money. If the parties are able agree upon a value range which is less than the combined costs of mediation then it would not be worthwhile seeking resolution in mediation, save unusual circumstances. While this seems obvious, it is worth remembering that the parties were unable to reach this realization pre-suit, however the reality of litigation and the costs involved often has a salutary effect on the parties equivalent to participation in mediation.

At the other end of the spectrum, complex cases where the stakes and values are high are also often settled without third party mediator input. This may be because such cases often settle later in the litigation cycle where positions and facts have been crystalized leaving little, from the parties' perspective, yet to be resolved. In these cases, particularly in two party litigation, the parties consider that they are better able to negotiate and have no need for mediator input, particularly if they believe that the mediator will not have sufficient knowledge of the case to help the parties assess liability and quantum[4].

For many cases, the avoidance of mediation reflects the personal preferences of the attorneys, and their clients, who may consider that mediation

[1] The 8 Benefits of Mediation - The Liberty Group June 8th, 2017. 1) Greater control, 2) It's confidential, 3) It's voluntary, 4) Convenience, 5) Reduced costs, 6) Faster outcome, 7) Support, 8) Preservation of Relationships. http://thelibertygroup.com.au/8-benefits-of-mediation/ https://www.k-state.edu/hcs/work-life/employee-relations/dispute-resolution/mediation/advantages.html

[2] The American Judge's Association suggests that over 97% of cases are settled or dismissed before trial. Commentators disagree on the actual number of contested cases that survive Summary judgment and go to trial however they do agree that the numbers vary based upon the type of case, with tort cases having the highest pre-trial settlement percentage.

[3] The Georgia Supreme Court "encourages every court in Georgia to consider the use of ADR" as does the Georgia Bar's Professionalism Aspirational Guidelines which asks lawyers to "counsel clients about all forms dispute resolution".

[4] This approach overlooks the advantages of mediation identified in footnote 1 as well as the opportunity to resolve a matter in a face-saving environment where client and attorney management can more easily be addressed.

has little to offer when compared to their negation skills. Litigation lawyers, by their very nature, are skilled and practiced in negotiation and persuasion and are rewarded accordingly. This creates a culture where lawyers often consider that their negotiation skills are superior to their opponent, and consequently referring a case to mediation can be seen as diluting that advantage. However, this approach is counter intuitive as if both parties consider they have superior negotiation skills, then the most likely settlement achieved in bilateral negotiation will be the most reasonable one for both parties – thereby disproving both side's claims of superiority. Ironically, mediation may afford a better platform for the parties to demonstrate their negotiation skills.

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Bilateral Negotiations[5]

Many people see the resolution of a disputes as a binary exercise, conducted through a series of offers and counter offers until an agreed upon resolution is reached. The approach most often adopted to achieve resolution in a two-party negotiation is called positional bargaining. Positional Bargaining is the negotiation technique of setting out a position (typically expressed as a financial amount) and seeking to stick as near as possible to that position. The example most often cited is that of a negotiation at a market for an object where the seller wants a certain amount for the item, and the buyer will only pay a certain amount for that same item. If the parties, through offer and counteroffer, come to an agreement then the item is purchased. However, it is self-evident that the actual price paid may vary from purchaser to purchaser.

In the context of settlement negotiations, this approach often starts with both parties spending as much time as possible at or near their best position, waiting to see if the other side will move significantly. These negotiations often commence with disparate positions and small movements, while the parties are seeking to test the resolve of the other party. This method also results in a winner and a loser. One party typically concedes more than they need to, and the "skill" of the other party is seen as their ability to maintain a position for longer, possibly masking their true needs for agreement at a certain price. The disadvantages of positional negotiation centers around the time it takes for the parties to move from their respective positions, and their inability to move off pre-determined beliefs. Resolution is only achieved when one party's target point offer intersects with the other parties' resistance point. Despite this, many lawyers lament the days when deals were resolved by such in person negotiations based upon trust, however trust is established by a prior trading pattern which is now increasingly replaced by data which seeks to establish the price without reference to the specific nuances of the matter. This approach often overlooks the amount of information that is unknown by both parties[6]. In simplistic terms, neither side is likely to know what the other side's pressure point is, even if reached, as this strategy lends itself to brinkmanship and artificial positions.

Many lawyers lament the days when the lawyers, who typically knew each other and may or may not have mutual respect, would sit down and discuss their case, or talk over the telephone, and agree a value which they had every confidence their clients would accept simply by virtue of their recommendation. However, increasingly the ability of the external lawyers to reach such agreements have been restricted. The reasons for this are varied. In the insurance world, where carriers control so much of the defense strategy in litigation, some lawyers consider that there has been an erosion of trust as between defense lawyers and insurers which has undermined their ability to resolve cases. On the plaintiff side, there is the ever-present threat of competitors arguing that a case was undervalued. However, increasingly, the reason may have more to do with big data and the conflicting

[5] Bilateral negotiation is a negotiation procedure, where exactly two parties are involved (see ICI Global). https://www.igi-global.com/dictionary/bilateral-negotiation/2433

[6] Bilateral Negotiation with Incomplete and Uncertain Information. Chhaya Mudgal, Julita Vassileva. Chapter 16.

needs of the respective clients involved. For the defense lawyer, it is worth remembering that the claims handler likely has a data set of values significantly broader than the data or experience of the lawyer whose experience has historically been considered so valuable. The claims manager may have set a reserve based upon a set of assumptions that, unbeknown to both the insurer and their lawyer, are inaccurate and yet materially affect perceived value. Equally, on the plaintiff side, prior settlements, jury verdicts, competitor's claimed recoveries, and trends may also be based upon a smaller sample set than they are prepared to concede and the expectation of their client may be based upon inappropriate comparisons which may have been advertised widely but may be unlikely to be achieved in the case at hand. The factors that resulted in prior larger settlements and relied upon in the negotiation process may not mirror perfectly the case in hand. The complexity of litigation lies not in the subject matter, or the law, but rather in the amount of distinguishable data applicable to the case in hand, making prior precedents and decisions helpful but not dispositive. Both parties may therefore be working on assumptions that are, at best, incomplete.

Positional bargaining is a poor strategy if the parties are seeking to understand why their valuation is not being accepted by the other side. However, it might be an excellent strategy if the case falls neatly into an expected range based upon the direct comparison of the case with prior matters on both sides.

Principled Negotiation

In order to overcome the perceived short comings of positional bargaining, commentators have identified the concept of Principled Negotiation most eloquently in the seminal book *Getting to Yes, Negotiating Agreement Without Giving In*[7]. The premise of the Principled negotiating technique is that different people approach negotiation in different ways and that in order to move towards a 'good' agreement those participating in a negotiation should depersonalize any reaction, listen intently and seek to understand the rationale and emotion behind positions adopted. This approach utilizes an integrative strategy where the parties seek to integrate the aims and goals through shared problem solving. By doing this, the party negotiating with this technique will be better able to identify solutions, understand issues blocking resolution and find ways for mutual gain. Additional tools employed include; seeking criteria that can be agreed by both parties, not responding to emotion but rather seeking out items that can be agreed to diffuse any outburst and adopting the technique of "active listening[8]". These techniques are to be used to get the negation back on track with the rationale that both parties will ultimately engage in Principled Negotiation, resulting in the hoped for "win/win" agreement or resolution.

In the context of a negotiation in litigation, many parties like to further refine their skills by deploying proven negotiation techniques. These might include the establishment of a Best Alternative to a Negotiated Agreement (BATNA)[9] which seeks to determine at the outset, a final position not to be crossed, absent a jury or bench trial. In the negotiation, the BATNA anchors the party to a position which, if not satisfied, will result in the matter proceeding to trial but is used both in positional and principled negotiation techniques. Other useful techniques include writing down your objectives prior to the negotiation (and checking them off as the negotiation continues) and the technique of asking questions to gather information, and then only trading movement for answers to questions designed to better understand the other party's position and their relative strengths and weaknesses. Much has been written about the advantages of "going first" and starting the negotiation with an aspirational number (using an odd number for additional effect) and how this approach creates the bracket for subsequent negotiations[10] to which both parties react rather than focusing on actual value.

However, a major limitation of this approach is that it requires one, or preferably both, parties to adopt this strategy to achieve the best results. As a result, it works best with those parties who want to resolve their case and are willing to adopt the same negotiation strategy.

Additional factors and strategies include the adoption of High Power based negotiation strategies[11], as well as those strategies adopted to negate such advantages (such as seeking to move the negotiation by making the parties focus on any communality of interest, fairness and emotion which, if effectively deployed, can balance out the advantages that a party may have utilizing high power-based negotiation techniques).

[7] Roger Fisher and William Ury, December 1st, 1991.

[8] Wikipedia- Active listening is a technique that is used in counseling, training, and solving disputes or conflicts. It requires that the listener fully concentrate, understand, respond and then remember what is being said. This is opposed to other listening techniques like reflective listening and empathic listening. Reflective listening is where the listener repeats back to the speaker what they have just heard to confirm understanding of both parties. [inconsistent] Empathic listening is about giving people an outlet for their emotions before being able to be more open, sharing experiences and being able to accept new perspectives on troubled topics that cause emotional suffering. Listening skills may establish flow rather than closed mindedness. Negative emotions include stress, anger and frustration.

[9] Getting to Yes ..see footnote 7.

[10] Wharton Work-Nano Tools for Leaders, March 2018 provides a short summary of a number of the advantages where price is the over-riding objective.

[11] See *Art of War* -Sun Tzu for examples of high-power strategies as well as the challenges that such approaches can have. This military book has been a board room staple for decades, for good reason.

Application of Negotiation Techniques to Bilateral Negotiations

So, which of these methods is best for the parties to adopt in bilateral negotiations? Like all good questions posed to a lawyer, the answer is "it depends". One of the great fallacies of the proponents of Principled Negotiations, is that it presupposes that both parties care about reaching a fair or equitable resolution, as opposed to imposing their will, and further that both sides will play by the rules and be willing to give up important information, making reasonable concessions and generally working toward resolution. The best negotiators decide which techniques they are going to deploy and either seek to impose that style of negotiation or rely upon it for their chosen strategy.

For the purposes of the examples below, I have divided the claims into emotional and non-emotional claims. Take a personal injury claim as an example of a highly emotional situation. The plaintiff has been injured, possibly severely, and the party facing the plaintiff has only one thing to offer – namely money. Why wouldn't the plaintiff want the absolute maximum that they can achieve? Is that amount more or less likely to be achieved through positional bargaining or principled negotiation? While apologies from the tortfeasor for causing the injury and respect to the plaintiff are a necessary start to negotiations, they should not be mistaken for establishing a basis for paying less than the claim is worth. On the issue of how much the claim is worth, that will, to a large extent, depend on how the parties perceive the financial risks and rewards of proceeding to trial (often set out in the BATNA before or during the negotiation). So, in this context, taking a principled approach will work well for the receiving party as long as the paying party is willing to pay more than the claim is worth—the only scenario in which both parties are happy. If only the paying party adopts the principled approach, it will be challenging to obtain concessions or agreements as the negotiation will be asymmetric. A positional bargaining negotiation style can frustrate a principled approach which relies upon the adverse party coming around to a style of negotiation that deviates from their original strategy. For casualty claims, which are typically emotional and unlikely to involve the need for any ongoing relationship between the parties, positional bargaining may yield more favorable results for the receiving party. In this case, the receiving party is concerned primarily about the amount received. Emotional elements, such as the desire for recognition of the injury, apology, responsibility are all factors that may play into the mind-set of the party injured and seeking settlement, however the ultimate decision will likely turn on "how much". It is rare in a two-party negotiation for asymmetric settlement techniques to satisfy both parties, as the party adopting the positional approach has no incentive to change tactics.

As a result of the limitations of positional bargaining, many involved in ADR consider that it is inferior to the principled approach, which, coupled with judicious use of emotional intelligence[13], emphasizes areas of agreement and seeks to use basic psychology to support the proposition that human nature will drive agreement if the parties position is recognized at an emotional level, not simply a factual appreciation of the positions adopted. This is a laudable goal but in practice it does not always work as the parties may have adopted differing negotiation strategies, for good reason (see above). The basic dynamic of a two-party negotiation requires both sides to adopt a similar negotiation strategy to succeed.

Do the same dynamics apply to non-casualty disputes where the perception is that the dispute is less emotional and consequently the parties would be more likely to adopt a principled approach in negotiations? An example of such a case may be a business dispute over quantum, or a coverage issue where conflicting valuations, or legal opinions, are less likely to be as emotional. In these cases, it is easier to see that a principled approach to negotiation should yield better results for both parties who are seeking resolution. Here, there is likely to be greater uncertainty about the legal outcome of the dispute, or even the jury's interest in the case. For there to be a resolution, the parties will find benefit in exploring the facts and the law in order to better understand why their position has not been accepted by the other side. This will involve the questions and answer sessions used in principled negotiation. A clearer example might involve a software dispute where there is an on-going relationship between the parties and the need for continuity of that relationship on both sides. Positional bargaining is such circumstances could have long term negative effects however reasonable the financial resolution achieved.

[12] Sanford Gage- Making The Right Decision at Mediation. This article looks at the statistical benefits for plaintiffs in rejecting final settlement offers within mediation and the risks/rewards of doing so in California. Of interest is that although the plaintiffs are statistically more likely to receive less than offered in mediation, when they do recover more, they do so significantly in excess of the offer within mediation. Defense counsel has a high degree of success in maintaining awards at, or below settlement offers in mediation, however the consequences of getting it wrong can be severe.

[13] PositivePsychology.com. January 9th, 2020."Drawing from several different sources, a simple definition of emotional intelligence...describes an ability to monitor your own emotions as well as the emotions of others, to distinguish between and label different emotions correctly, and to use emotional information to guide your thinking and behavior and influence that of others (Goleman, 1995; Mayer & Salovey, 1990)."

Third-Party Dynamics in Both Positional Bargaining and Principled Negotiation

There are many factors behind a party's decision to mediate (see footnote 1 above). However, which of the factors applies, or is dominant, may not be known and may never be addressed in the settlement discussions. There is perceived benefit in engaging the services of a mediator who, it is expected, will bring an objective, knowledgeable, and inquisitorial approach designed to disrupts the positional bargaining strategy of both advocates, and facilitate discussions. It is not necessary for the parties to change their style of negotiation if they have adopted a bilateral approach to a principled approach (although it would certainly help the mediator).

Even if both parties have adopted a principled approach to the negotiation, there may be reluctance on the part of the parties to share information. The mediator, because of their obligation to remain neutral and maintain confidentiality, is placed in a privileged position where the parties can discuss their case openly and use the mediator to explore positions without having to fully commit to those positions. Something that is hard to do in bilateral negotiations.

However, one of the greatest benefits that a good mediator is able to bring is their knowledge of both parties' positions. This knowledge may take time to develop, but most successful mediations involve the revelation of aspects of both side's cases, through the mediator. In this privileged position, the mediator is perfectly placed to discuss options with both sides and show the "creativity" so highly valued in top mediators. Knowledge can be gleaned from pre-mediation briefs, and discussions, but often the critical knowledge is learned during the mediation itself. In order to obtain this privileged information, the mediator will likely adopt many of the elements of principled negotiation with both parties. The mediator relies on human nature to do this as most parties want to talk about their case- just not directly with the other side as they are fearful of revealing weaknesses or pressure points. For this process to be successful the mediator will need to establish trust, as only with trust will the partis be willing to reveal elements of their case which will lead to resolution. Once armed with this knowledge, even if such knowledge cannot be shared, the mediator will be in a strong position to eliciting further information from both sides and will be in a better position to assess the true pressure points. This process significantly increases the chances of a successful resolution. Simple knowledge, even if it cannot be used, provides the party with knowledge a degree of confidence as it is a predicter of future behaviors based upon an understanding of the impact of the information on the party or parties. Care must be taken as before the mediator can rush out a forge a settlement based upon any new information, it is important for the mediator to establish what, if anything can be shared.

If the mediator were to simply adopt a positional bargaining (the much complained about shuffling offers back and forth[14]) it is unlikely that these factors would emerge. So, from the standpoint of seeking a resolution, the disruption of a positional bargaining stance can be achieved by the mediator whatever negotiating stance is adopted by the parties. The best way to achieve this is for the mediator to adopt some, or all, of the characteristics of the principled negotiation techniques in order to draw out information relevant for resolution.

EVEN IF BOTH PARTIES HAVE ADOPTED A PRINCIPLED APPROACH TO THE NEGOTIATION, THERE MAY BE RELUCTANCE ON THE PART OF THE PARTIES TO SHARE INFORMATION.

As humans we also have a tendency to want to share information[15]. Within the context of a mediation, this may be factual or emotional information (or both). The very essence of such sharing puts the mediator in that privileged position in which they possess critical information that may help (or hinder) resolution of the matter. A good mediator will deploy that information (provided permission has been given to do so) at the most judicious moment in order to bring the parties together, never forgetting that the mediator is not deciding the case but rather seeking to bring the parties together so that they can resolve the case.

[14] The process where a mediator simply communicates offers back and forth between the parties without explanation or engaging with the parties to understand the rationale for the offer or counteroffer).

[15] There are many articles that address the psychological desire of humans to share information, see Coschedule Blog, October 2nd, 2014 for a straightforward analysis.

Empirical Evidence to Support the Contention that Mediator Assisted Negotiation Yield Preferable Outcomes[16]

So far, we have addressed the benefits of using a third-party mediator, from the standpoint of achieving resolution, as well as some of the limitations. However, the key question is; do the benefits translate into advantages to both (all) parties who chose to resolve their maters in a mediation, as opposed to bi-lateral negotiation?

The ADR industry relies upon statistics to support its proposition that mediations are an effective method for resolving disputes[17], Mediators often point to their success rate as a percentage of cases mediated[18]. ADR centers point to the increased use of their neutrals and, those parties who do conclude their claims within a mediation typically concede that the mediator was a necessary participant, if only to get both, or all sides, to talk to each other in a neutral venue[19]. Easier to agree to a mediation than a settlement meeting in person or over the phone, particularly if a long-held position needs to be dropped in order to resolve a case.

So, what happens if a matter doesn't get resolved in mediation? Can mediators take credit for subsequent resolution (even if achieved directly between the party) based upon the mediator's assertion that the mediation made "progress" and enabled the parties to narrow the issues or helped in 'client management" setting up the conditions required for subsequent resolution? Many mediators do take credit as statistics on settlement percentages are not always limited to cases settled on the day of the mediation.

In order to support the proposition that mediations are more effective that bilateral negotiations it would be helpful to be able to compare a statistically relevant sample of similar cases and compare the outcomes of those cases, in terms of settlement value and cost. However, to do this would only establish the values of those cases. Even if the settlement values (net of legal costs and taking into account the time/value of money) were to be the same, other subjective factors might be in play (albeit in a large enough sample this might be overcome). For relatively small personal injury claims, property damage losses and other high frequency low value claims, the data does exist or can be established as the number of data points[20] that affect value are relatively small. However, these are the very cases that are settled directly between the parties' lawyers, as there is a high degree of certainty as to the outcome, if the matter were to proceed to a final determination. What is much more challenging are the higher value cases where additional factors, lower frequency and the specifics of the cases create an environment where the data is helpful but unlikely to be determinative of the ultimate outcome which creates a range of values, often quite disparate. Despite this the parties will use the data they have in order to seek to provide guidance which will enable them to narrow the range of probable values. The problem with this approach is self-evident – simply they don't have enough data. Even if they have access to a national data base, extensive experience in the subject matter, venue and even with the judges who may ultimately preside over the case, they are missing key information. Furthermore the old adage that

A SKILLED MEDIATOR SHOULD BE ABLE TO OBTAIN CASE CRITICAL INFORMATION BEYOND SIMPLE DISCOVERABLE EVIDENCE SUCH AS MOTIVE, PRESSURE POINTS, RISK TOLERANCE AND EVIDENCE THAT IS RELEVANT BUT NOT DISCOVERABLE.

"you haven't tried a case until you have lost a case you should have won and won a case you should have lost" is highly relevant, as jury trial are by their very nature hard to predict – hence the proliferation of jury consultants, and the time/money spent on motions in limine and voir dire. In order to resolve these issues, more data is needed[21] and more data analytics, however currently in the context of litigation, the best, and possibly the only "party" who can obtain that the information or data outside of discovery that goes to the heart of the rationale for settlement is an independent third party that both sides will trust and who can keep such information confidential. In short, the mediator. Practioners may point to the discovery process as fulfilling this function, but most cases are not won in deposition although they can be lost there. A skilled

[16] For an understanding of just how complex the question is; see Introduction to Statistical Mediation Analysis by David MacKinnon, 2008.

[17] There is plenty of evidence that suggests that the overall effectiveness of the third-party model for negotiations delivers consistent "ROI." In a survey of cases using third-party negotiators, parties report a 75% satisfaction rate with the negotiator or mediator themselves and a settlement rate of 60%. However success rates vary considerably. There is a distinction between success versus the satisfaction of the outcome.

[18] 85% seem to be a popular claim by most mediators although the percentage varies between the types of dispute considerably. The Centre for Effective Dispute Resolution (CEDR) in the UK claim a success rate of 89% for corporate mediations although tis be driven by cost shifting in the UK.

[19] Venue is an important psychological component of comfort which affects the parties' approach to settlement.

[20] Data is used extensively in litigation by both plaintiff and defense firms however insurers, who typically have the greatest access to claims data, are the most prolific users of data in claims handling and a whole industry has sprung up around the extrapolation and analysis of such data. See, for example, almost any of the numerous articles published on the issue of data analysis.

[21] The theme of all these articles on the use of data in litigation is simple. The more we are able to gather data points the better the predictive analysis and anticipated outcome.

mediator should be able to obtain case critical information beyond simple discoverable evidence such as motive, pressure points, risk tolerance and evidence that is relevant but not discoverable. This type of "evidence" drives resolution and it is the application of these factors within a mediation that drive settlement. It is unlikely that predictive data will be able to correctly address these factors as by their very nature they are hidden from the formal legal process. The greatest skill of a mediator may not be in their ability to bring parties together through empathy and emotional intelligence, but rather to identify the issues that really matter to the parties and use that, if allowed, to help the parties resolve their case. After all, to quote Elle Woods " On our very first day at Harvard a very wise professor quoted Aristotle... "the law is reason free from passion." Well... no offense to Aristotle, but in my three years at Harvard I have come to find that passion is a key ingredient to the study and practice of law...and of life"[22]. Litigation is almost always passionate and understanding this is a key component of any resolution.

So, what can you prove to support the proposition that mediations are preferable to bi-lateral negotiation? Surprisingly there is little objective statistical analysis to support the argument, although the increased use of mediation, including early (pre-suit or post close of pleadings) mediation, suggests that practitioners and clients can see the benefits even if they are not easily measurable statistically or financially. History also suggests that mediation is a very effective form of negotiation leading to a successful resolution of many different types of dispute, this has been the case from ancient times[23] and throughout history. The characteristics of mediation *(Footnote 1)* have been recognized for centuries, but defining them constantly and establishing an order of priority has proven to be an elusive goal as evidenced by the number of articles, including this one, written on the subject.

Is the weight of human historical experience sufficient to be able to simply state that mediations are the most effective means of resolving disputes? Possibly, but for every such claim, there are questions that we are currently unable to measure accurately. Take for example the research done in Singapore[24] (which supports the contention that early mediation is more effective than late stage (post discovery) mediation in enabling the parties to resolve their disputes. On the face of it, this research provides a compelling argument in favor of early mediation. However, do cultural issues play a part? Is Singapore a jurisdiction where parties are encouraged to resolve their issues amicably and are the results simply a reflection of the desire by the parties to resolve their cases in an environment where cost shifting would mean that the losing party at trial ends up paying the winning parties legal costs and fees?[25] Closer to home, in California, insurers often seek early mediation in employment law matters where legislation as created an environment where insurers may be more concerned about the cost and legal expense exposure to the other side than the award itself.[26] In California, there is no corollary benefit for the paying party in many employment disputes, further increasing the pressure to resolve matters. However, in both examples, despite the clear pressures to resolve cases that the litigation process imposes, the parties still chose to mediate rather than discuss the matter over the phone or exchange offers through direct attorney to attorney positional bargaining.

In order to understand the difficulty in creating a model for measuring the success of mediation in resolving complex claims, try asking yourself how many factors, and parties, go into a successful mediation? Once you have that calculation, assuming you can establish a set of factors that are universally agreed, what will your subject matter be and how do you calibrate the example for the relative strengths or weaknesses of the parties, their lawyers and the mediator? Much has been written about how Power positions[27] and how the lack of power can be significantly improved through the adoption of settlement postures prior to, and during, the mediation and how such tactics[28] improve the outcomes dramatically for that party. However, the models adopted are simple and do not appear to address the emotional values that parties attach to their positions[29].

Ironically, it is a good mediator's ability to manage those emotional values that can have the greatest effect on the outcome of the mediation. So even if we were able to calculate and weight the factors in play in a mediation, and reduce the influence of high/low power positions of the parties, and address any short comings of the mediator- would we have a model that would enable the parties to effectively dispense with mediation and

[22] Reese Witherspoon, *Legally Blonde*.

[23] Ancient Greece used mediators to resolve neighbor disputes, Ancient Rome used a number of different words to describe mediators, however earlier references can be found of individuals mediating between parties in essays, writings and reported histories often in the context of war and peace.

[24] How Should Courts Know Whether a Dispute is Ready and Suitable for Mediation? An Empirical Analysis of the Singapore Court's Mediation Referral of civil Disputes to Mediation, 23 *Harvard Law Review* 265(2018).

[25] The "English rule" applies in Singapore civil litigation and provides that the winning party is paid their legal costs by the losing party, in addition to any judgment or award.

[26] California Labor Code provides for certain claims that an employee who wins a lawsuit can recover their legal fees but not vice versa.

[27] For an example of the research and analysis of power in negotiation see: Power Dynamics in Negotiation (October, 2005), Peter Kim, Robin Pinkley and Alison Fragale.

[28] Methods adopted to counter-act High Power Positions include the deployment of concepts such as rights, fairness as well as writing down positional strengths. An example includes "Business Negotiation Solutions: Coping with Low Power Our business negotiation solutions can help you avoid making unnecessary concessions when you lack power at the table. The key is to avoid the anchoring effect". Harvard Law School Program on Negotiation, January 14th, 2019.

[29] The role of anger is often considered a negative trait in mediations, however this article takes a more balanced approach while recognizing its importance in many negotiations. https://mindengross.com/docs/default-source/publications/the-role-of-anger-in-mediation

resolve their claim through algorithms?[30] While for simple disputes with limited factors in place (and which often turn on the singe issue of price for a product or service computer aided mediations have started to emerge. The difficulty of this approach is that every time you seek to expand the ambit of the computer aided mediation, an exponential number of new variables need to be addressed and weighted and, at each expansion, the dangers of inaccurate software logic and bias grows.

The challenge of identifying all of the factors that go into a mediation and then seeking to manage them in a way that enables us to accurately measure the effectiveness of mediation is that it is not a reflection of our human characteristics. We start negotiating the day we are born: smiles, eye contact, screams and progress and as we progress into adulthood we learn from experience. Some lawyers excel at adapting their negotiating stance and approach through past triumphs and failures, while others seem have less success in adapting or simply don't want to. Governments and trade associations seek out professional negotiators whose are lauded for their skill in negotiation but the greatest skill in the world cannot overcome a bad case and a good opponent without "good luck," being that term we apply to factors we were unaware of that result in our resolution looking better than we anticipated.

There have been many attempts to calculate the outcome of mediations and establish equations to predict outcomes[31]. Even if there were to come a time when computer aided or AI mediations are able to act as a mediator in complex disputes, thereby disrupting the mediation industry, the same logic would also apply to jury trials creating the dystopian future currently imagined only in books and films[32]. Given human history, it seems unlikely that civil litigation will be replaced by machines anytime soon leaving the choices somewhat limited for those involved in the litigation process: 1) have the case decided at trial, 2) settle pre-suit or 3) settle during the litigation either through bilateral negation or mediation.

As even the best jury consultant will never know all the factors that the jury will weigh and consider critical in their decision-making process, and most parties will continue to settle their claims before trial. So, the most likely question that parties will need to ask is, given they will be settling what is the most effective mechanism for achieving that settlement and when should you settle?

Summary

To answer the question do mediators add measurable value in the process in dispute resolution, the parties must first ask what they are trying to achieve, whether simply resolution for a fixed amount, confidentiality, "a day in court," cost savings, certainty in outcome, the ability to achieve self-determination, or some other reason?

Once the motive has been established, the next question should be; is mediation the right mechanism to achieve the desired result? If the price of resolution is not set, or if there are too many variables to have clear guidance or if the risks/reward of not settling are uncertain, then mediation is far more effective than litigation in unveiling the factors that provide greater clarity and with greater clarity resolution.

Put simply, bi-lateral negation is no way to resolve complex matters as both parties cannot be right on price.

[30] Despite attention grabbing headlines, AI and computer mediated disputes are in their infancy and can only address very limited facts and issues. https://www.ft.com/content/187525d2-9e6e-11e9-9c06-a4640c9feebb

While, no doubt they will become much more sophisticated over time, they are likely to be used to predict outcome and essentially become another analytical tool rather than a replacement of individual mediators.

[31] David Kenny's work, see article September 25th, 2018, suggests that in order to model outcomes one has to assume that mediators effect the outcome and not vice versa (although this is possible). His article sets out the different statistical approaches that have been employed in the analysis of mediated outcomes and their relative strengths and weaknesses.

[32] In the film *Minority Report* (2002), loosely based on the short story by Philip Dick, 1956, criminals are arrested based upon predictive analytics before they commit a crime.

ABOUT NIGEL J. WRIGHT

As a mediator and arbitrator, Nigel Wright offers 30+ years of litigation and dispute resolution experience. He is a practicing New York and Georgia attorney and solicitor of the Senior Courts of England and Wales. Nigel has been a senior partner at two AM 100 law firms on both sides of the Atlantic and represented corporations and entities in Federal and State Court, in various international civil forums as well as in administrative and regulatory hearings and proceedings. Nigel's experience encompasses extensive domestic and international mediations and arbitrations.

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