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## Mediating Employment Disputes

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## **I. INTRODUCTION**

Over the last two decades, mediation as a tool for resolving disputes has become increasingly commonplace. It is beneficial in virtually any type of dispute, but can be particularly effective in employment disputes. This article provides a brief overview of mediation and its benefits, some common obstacles to success in mediation as well as factors that may lead to successful mediation in the employment context.

### **A. What is mediation?**

#### **1. Description of mediation.**

Mediation is a form of alternative dispute resolution (“ADR”) in which the parties to a dispute are assisted by a neutral third party in reaching a negotiated resolution. It is characterized by party control over both the mediation process – who will be the mediator, when mediation occurs, who will participate, what issues will be addressed – and the mediation outcome, *i.e.*, whether any decision will be reached, and if so, on what terms. A mediator is *not* a decision maker. Many courts now have programs that may require the parties to attempt some form of ADR, and some courts may even require the parties to attempt mediation. But even in a court-ordered mediation resolution remains firmly within the parties’ grasp. Neither court nor mediator can order the parties to agree.

It is not uncommon for the uninitiated to confuse mediation with arbitration. Arbitration is also a form of (usually) voluntary dispute resolution that occurs – more or less – outside the judicial system. However, that is about where the similarities with mediation end. While parties may have voluntarily chosen arbitration to resolve a dispute, typically the arbitration process is governed by rules established by courts or arbitration services, although the parties may have some ability to alter these rules. More importantly, though, the arbitrator, like a judge or jury in a courtroom trial, makes a

*decision* that is to be binding on the parties. In short, the parties to arbitration generally do not fully control the process, and have very little control over the outcome.<sup>1</sup>

A typical mediation will usually commence with all parties (and their lawyers if the parties are represented) together in a room with the mediator. Each side may offer a brief summary of the dispute from their perspective. The mediator will ask questions of each side in an effort to elicit information, but also to build trust between the parties and the mediator and between the parties themselves. Many mediators will, at some point, separate the parties and meet in private caucuses with each side. In the course of the discussions, the mediator will sometimes assist in the development of offers and counteroffers and other times will be merely the conduit for proposals and counterproposals between the parties. Though the mediator may assist the parties, the mediator's neutrality – of having nothing invested in the outcome – is both a characteristic and a necessary ingredient of the mediation process.

## **2. Mediation methodologies.**

There are a number of mediation methodologies but the two most common are “facilitative” and “evaluative.” A purely facilitative mediator is just that: someone who facilitates the discussions between the parties, usually through open-ended questions, and by listening and attempting to frame and reframe the issues so as to help the parties achieve common ground. Many facilitative mediators will not break up the mediation into private caucuses, believing that to do so is inconsistent with the goal of having the parties talk to one another.

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<sup>1</sup> The judicial system affords still less control to the parties over either the process or the outcome. The procedures are set by legislators (and in some cases judges) and have the force of law. The outcome is likewise determined by what the legal system permits a judge or jury to decide.

Evaluative mediators may adopt many of the same techniques as facilitative mediators, but tend to provide opinions of the strengths and weaknesses of the parties' respective positions. Not surprisingly, therefore, evaluative mediations are often conducted largely, if not exclusively, through a kind of shuttle diplomacy, with the mediator discussing issues with each of the parties separately and the mediator offering evaluations to the parties privately. In the course of that process, the mediator will transmit proposals and counterproposals.

**B. What are the benefits of mediation?**

The benefits of mediation flow directly from its attributes.

**1. Party control.**

Because the parties control how the discussions are structured, whether an agreement will be reached, and what terms that agreement will include, there is a greater chance that they will be satisfied with the outcomes. To the extent that the parties are invested in working together to arrive at resolution, they are more likely to achieve results that meet their real needs and with which they are satisfied.<sup>2</sup> Even when the mediation may result in no immediate resolution, mediation nevertheless can afford some measure of psychic or emotional satisfaction to the parties because they governed the process. Indeed, research into negotiating behavior indicates that “[w]e can feel reasonably satisfied with an unfavorable outcome if we know that the process that generated it was fair.”<sup>3</sup>

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<sup>2</sup> Allred, K., “Relationship Dynamics in Disputes: Replacing Contention with Cooperation,” *The Handbook of Dispute Resolution* (Moffit, M. & Bordone, R., eds., 2005) [hereinafter *Handbook*] 92.

<sup>3</sup> *Id.* at 91-92.

## **2. Interests v. positions.**

A second benefit of mediation is directly linked to the first. Mediation permits the parties to discuss their interests, as distinct from their positions, and to try and reach results that address those interests. The distinction between interests and positions is best described through an example. Imagine an employer and a labor union at an impasse over wages. The union is threatening a strike and the employer is threatening a lock out or to hire replacements if a strike occurs. The respective negotiating demands and threats are their positions. But their interests are more complex, and may even be masked by their positions. The employer does not want a disgruntled, fractious and unproductive workforce and cannot afford a lengthy work stoppage, but neither does she want her wage costs to make her business uncompetitive. The union wants to insure its members a living wage, but is fearful that a lengthy work stoppage will decimate its ranks and does not want the employer to begin layoffs as a cost-cutting measure, to go out of business or to move operations offshore. By addressing those underlying interests, the parties may be able to find a way around the impasse, perhaps by the union giving a bit on wages and offering to loosen work rules to increase productivity in return for increased job protections from the employer.

## **3. Creative solutions.**

A third benefit of mediation, which is likewise related to party control and to interest-based bargaining, is that it offers the parties the opportunity to craft creative solutions that could not be ordered by a court. The legal system, while very good at reaching rule-based results, is constrained by those very same rules in the kind of relief that it can afford the parties.

An employment case that was recently mediated illustrates the benefits of party control, interest-based bargaining and creative resolutions. The plaintiff was a retirement age, African-American man. The defendant was a local high school. Plaintiff had worked for a number of years at the high school in a variety of positions that permitted him to work with at-risk youth, who had attendance problems and were at increased risk for dropping out. The positions had had uncertain funding and were given different names depending upon the funding source. Eventually, all funding dried up and plaintiff was laid off. Plaintiff believed that the school had managed to find funding for white employees who, he believed, did similar work. He sued for race discrimination, seeking reinstatement, damages and attorneys' fees.

In the course of negotiations, plaintiff talked about the deep sense of responsibility he had felt to provide a role model and to be a mentor for the at-risk students. It also became apparent that the school officials had very high regard for plaintiff and the work he had done. Unfortunately, there simply were no funded positions available for which he was qualified and which would permit him to continue to work with students. Nor could the school simply create a position without running afoul of a great many legal, financial and regulatory constraints. The school had a very strong legal position on the facts with respect to plaintiff's claims, but because of plaintiff's popularity and the political climate in the local community, the school was uncomfortable with a "go for the jugular" litigation strategy. Nevertheless, if pressed the school was prepared to file a motion for summary judgment, which had a strong chance of success. As plaintiff talked more, it came out that he was a pastor at his church and was really more interested in retiring than continuing to work, so that he could counsel and mentor

his own grandchildren as well as the children of church members. Unfortunately, for a variety of reasons he had been credited for retirement purposes with fewer years than he had actually worked, but any claim for additional retirement credit he may have had was barred by the statute of limitations.

After a couple of mediation sessions, plaintiff agreed to dismiss his case in return for payment of his attorneys' fees and several more years of retirement credit. The additional retirement credit permitted him the financial cushion in retirement he needed so that he could attend to his pastoral duties and his grandchildren, while giving him a sense that some justice had been done. The settlement cost the school far less than litigation or other settlement options and permitted the school to feel as though it had helped out a well-regarded former employee. No court could have ordered the relief that the parties agreed upon: plaintiff was barred from suing over the retirement issues and was not likely to have prevailed on his race discrimination claim. But, whatever the result on the race discrimination claim, one of the parties would have gone away angry and frustrated and both parties would have expended enormous time, money and resources in the process.

#### **4. The opportunity to be heard.**

A further benefit that mediation provides is process-oriented. It frequently provides a much needed opportunity for the parties to tell their story and be acknowledged in a safe, neutral environment. This can have a genuinely cathartic effect that can make resolution more likely. Simply having the opportunity to tell their story to someone who will actively listen and who will acknowledge the parties' feelings can often make all the difference between whether parties are willing to settle or not.



For example, in case involving a claim of race, religious and national origin discrimination, the plaintiff worked for a large grocery chain. After a new supervisor came on the job, plaintiff and the supervisor had a series of run-ins that culminated in plaintiff being fired. Plaintiff believed the supervisor was engaged in discrimination; the supervisor thought the plaintiff was obstinate, irrational and difficult. At the mediation session, plaintiff was demanding a settlement well above \$1 million, an amount that the defendant was never going to pay and which the case, viewed dispassionately, did not seem to justify. The plaintiff insisted that he wanted damages in that range to send a message to the company that it could not treat people in the way that he felt he had been treated. Meanwhile, it became increasingly obvious that even plaintiff's own lawyer was dismissive of him, had stopped listening and was even threatening to withdraw if plaintiff did not moderate his settlement demands. With counsel's permission, the mediator spoke with the plaintiff alone and gave the plaintiff the opportunity simply to talk about what had happened to him and how he felt about it, particularly how it had affected his marriage. Then through questioning, the mediator helped the plaintiff come to his own realization that his demands and expectations were unrealistic and would result only in continued litigation, stress and a highly uncertain outcome. After some additional discussions with the parties, the case settled within a range the defendant could justify and plaintiff went away satisfied that he had been heard.

The legal system may eventually provide a setting for parties to tell their story – in deposition or at trial – but those settings are bounded by the rules of evidence and procedures that are, as often as not, alien and puzzling to the parties. Sometimes the most important aspects of the story – how the parties felt, what their motivations were – are not

technically “relevant” or “admissible” in the lawsuit and therefore may never get aired. For example, in the case of the high school discussed above, the plaintiff’s real interest in retiring and spending time with his grandchildren and congregation would have been contrary to his formal request in the lawsuit that he get his job back.

In short, mediation can provide an environment where both sides have an opportunity to tell their story to a third party and to one another, and perhaps provide some common understanding that can be the foundation for agreement.

#### **5. Cost effective.**

It ought to be obvious from the examples discussed above that mediation can be especially cost effective. When considered against the cost of litigation, the incremental time and cost of mediation is modest, particularly if it results in settlement and thus avoids additional litigation expense. But even when cases do not settle during the mediation itself, mediation can result in hidden cost savings, for example, by preparing the ground for future settlement with or without a mediator or by clarifying and narrowing issues so that the parties can focus their litigation efforts more efficiently.

#### **6. Confidential.**

A particularly important attribute of mediation is confidentiality. Unless all parties agree, statements made during and documents prepared for the mediation are not admissible into evidence. No one, including the mediator, can be called as a witness to testify as to what occurred during the mediation.<sup>4</sup> Confidentiality in the mediation process is specifically designed to encourage the parties to speak freely, so that they can address the issues necessary to reach a resolution. It permits parties to acknowledge weaknesses that they would likely be unprepared to admit if their statements during

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<sup>4</sup> See Cal. Evidence Code § 1115 *et seq.*; *Rojas v. Superior Court* (2004) 33 Cal.4<sup>th</sup> 407.

mediation were admissible into evidence. And, as discussed above, confidentiality permits the parties to discuss their real interests, even if those interests are, to some extent, inconsistent with their stated goals in the litigation.

The cloak of confidentiality over the mediation process is to be distinguished, however, from confidentiality of any settlement that may result from the mediation. Confidentiality concerning settlement terms is a matter of contract between the parties. And, in some cases, such as settlements involving public entities, the parties are precluded by law from seeking to make settlement terms confidential.<sup>5</sup>

### **C. What are obstacles to successful mediation?**

Unfortunately, the benefits of mediation may go unrealized because the parties (or the mediator) consciously or unconsciously obstruct the process or otherwise contribute to its failure. Some of the more common obstacles are discussed below.

#### **1. Lack of preparation.**

Perhaps the single most common failing of parties and their counsel is a lack of preparation for mediation. Frequently, parties have given no particular thought to their real interests and or to what they wish to achieve in the mediation beyond staying above or below their “bottom line.” They have not considered what they will face in terms of risk, cost, loss of productivity, etc. should mediation fail. Nor have they taken time to consider, much less lay the necessary groundwork for, creative approaches to resolution.

The real fault for this lack of preparation often lies at counsel’s doorstep. Counsel frequently believe that “preparing” their client for mediation entails little more than providing a brief explanation of the mediation process and a quick check on settlement authority. Adequate preparation of the client surely includes discussing the mediation

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<sup>5</sup> *Register Division of Freedom Newspapers, Inc., v. County of Orange* (1984) 158 Cal. App. 3d 89.

process and settlement authority, but done correctly and thoroughly, preparation will permit the client to be an active, enthusiastic and effective advocate on their own behalf.<sup>6</sup>

## **2. Inadequate/flawed evaluation of risks.**

Closely related to lack of preparation is a failure by parties and counsel adequately to assess the risks of not resolving the dispute. Empirical studies show that parties tend to evaluate risks of loss and gain differently and, to some extent, “irrationally.” For example, people tend to prefer a guarantee of \$1,000 rather take a 50-50 chance that they will receive \$2,000 or nothing. In other words, they are “‘risk averse’ for medium probability gains.”<sup>7</sup> By contrast, people tend to be “risk seeking” when it comes to “medium probability losses,” i.e., they would rather take a 50-50 chance of losing \$2,000 or nothing, rather than a guaranteed loss of \$1,000.<sup>8</sup> Furthermore, people do not generally believe that a 50% chance of winning \$1000 is sufficient to compensate for a 50% chance of losing \$1,000. They need a 50% chance of gaining substantially more than \$1,000 to compensate for the 50% chance of losing \$1,000.<sup>9</sup> It is easy to see how these behaviors can interfere with a mediation’s success. A party may take an overly aggressive settlement posture because he is either risk-averse or risk-seeking in the particular circumstances, failing to recognize that the behavior is actually antithetical to reaching agreement. Similarly, parties often perceive settlement offers from the other side less favorably than they would have had they adequately assessed the risks at issue.

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<sup>6</sup> Curtis, D., “Getting More for the Plaintiff in Mediation: Showcase Your Stellar Client,” *The Trial Lawyer* (Spring 2004) 29.

<sup>7</sup> Birke, R. & Fox, C., “Psychological Principles in Negotiating Civil Settlements,” 4 *Harvard Negotiation Law Review* (Spring 1999) 1, 43.

<sup>8</sup> *Id.* at 44.

<sup>9</sup> *Id.*

Other factors will interfere with adequate risk assessment. Particularly in the employment context, plaintiffs sometimes overestimate their chances of success. This is the result of several factors, including the attention that is given to large jury verdicts by the media.<sup>10</sup> In addition, because of the significant emotional content often found in employment cases, plaintiffs may project outward their own emotional hurt and assume that others, particularly a judge or jury, will necessarily “feel their pain.” By the same token, employers – and too frequently their lawyers – overestimate their likelihood of succeeding in having the case dismissed prior to trial on summary judgment or underestimate the extent to which jurors may bring their own unconscious biases against employers into the jury box. After all, everyone has had a difficult or obnoxious boss at one point or another.

Parties sometimes believe that they should proceed to a decision, rather than reach a negotiated resolution, because a victory for them will “send a message” to the other side. Employees want a big verdict so that the employer will think twice before treating someone else as they were treated; employers want it known that they will not be “held up” by frivolous claims. Undoubtedly, on occasion such messages will, and perhaps should, be sent. But the frequency with which parties to mediation rely upon this obstacle to resolution suggests that too often the parties have not adequately evaluated their own interests and the risks and costs of litigation or are simply overestimating the importance of the particular case.

In a recent case, the employer and employee were in a dispute that arose in the context of a labor organizing drive. The plaintiff-employee and a member of management got into a bit of an altercation. The police were called and both parties

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<sup>10</sup> *Id.* at 9-10.

ended up making citizen's arrests of one another. The plaintiff sued for false arrest and violation of his civil rights. This was a classic tempest in a teapot and both the union and the employer's insurance carrier were prepared to settle for a modest sum. But the employer refused to authorize the insurance carrier to fund a settlement, insisting that the amount suggested would open the floodgates to future litigation. The case did not settle and the union proceeded to file multiple lawsuits against the employer having to do with a variety of issues. Perhaps those lawsuits would have been filed in any event; but declining settlement did not gain the employer any advantage.

### **3. Trying to "win" the mediation.**

Parties sometimes perceive mediation as just another front in the war, rather than as the alternative to war. That can lead to a number of behaviors that are particularly counterproductive. A desire to "inflict pain" through the settlement, to teach the other side a lesson or to prevent the other side from exiting the negotiation with dignity in tact can be particularly antithetical to resolution.

### **4. Negative emotional states.**

The emotional state that parties bring to the mediation can have a major impact on the success or failure of the mediation. Employment cases, like family disputes or serious personal injury cases, frequently have an emotional component that may be less pronounced in other types of disputes. Because self-worth is often bound up with work, and because the employment relationship is both an interpersonal and a power relationship, it is not uncommon for employment disputes to produce strong emotions. A plaintiff who has lost a job may be experiencing depression and unconscious grief over the loss that is manifested as anger and as a desire to "make the other side pay"; a supervisor accused of race discrimination may feel humiliation and defensiveness – and

fear for her own job – that manifests as an unwillingness to acknowledge any failing or to compromise lest that be taken as an admission of racism.

Expression of strong emotion is not only legitimate in mediation, it may be necessary in order to move the negotiation forward.<sup>11</sup> But negative emotions – particularly when directed toward the other party’s character or toward the negotiation process itself – can just as easily derail the mediation.<sup>12</sup> This is especially true if the client has not adequately separated her legitimate emotions over the events leading to the dispute from her emotional state toward attempting to resolve the dispute.

### **5. Reactive devaluation.**

A well-known phenomenon that can interfere with successful negotiations is “reactive devaluation,” which is “the tendency to evaluate proposals less favorably after they have been offered by one’s adversary.”<sup>13</sup> This usually reflects a fundamental lack of trust in the other side or the misconception that resolution is a zero-sum proposition.<sup>14</sup> Reactive devaluation sometimes comes into play in employment cases because such cases frequently involve components of damage that are relatively easy to quantify (wages, benefits and like). Thus, it is easy for one side or the other to dismiss an offer since it can be readily compared to a quantifiable amount. Most often, though, reactive devaluation is nothing more than one manifestation of the bad blood between the parties that frequently characterizes employment cases.

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<sup>11</sup> Shapiro, D., “Enemies, Allies, and Emotions: The Power of Positive Emotions in Negotiation,” in *Handbook* at 73-74.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 49.

<sup>14</sup> “Fixed-pie bias (i.e., the assumption that what is good for my counterpart must be bad for me) may contribute to reactive devaluation. . . .” *Id.* at 48.

## **D. How can the mediation be “set up” for success?**

### **1. Defining success.**

At the outset, it is important to define what is meant by success in mediation. While it is understandable that a mediation that has resulted in a full resolution of a dispute is seen as “successful,” that is too narrow a view of the mediation process. It is possible that a mediation that results in resolution was actually unsuccessful in important respects if one or both parties believe the process was flawed or unfair. As noted above, belief in procedural justice has a strong impact on the willingness of the parties to accept and respect the outcome. Similarly, a mediation that does not result in full resolution can nevertheless be considered successful if it helped the parties clarify their own interests and needs, narrowed the issues in dispute or educated the parties about one another’s interests.

### **2. Preparation.**

More generally, the characteristics of successful mediations are, to a great degree, the flip side of the characteristics that cause mediations to fail. The single most important factor in successful mediations is adequate and effective preparation by counsel and the parties. Effective preparation for mediation should encompass a discussion of at least the following issues:

- The party’s own interests, not just positions, and how those interests could be met;

- The other side’s interests, and how those could be met;

- The best and worst alternatives to a negotiated settlement;

- The strengths and weaknesses of case;

- The potential for creative approaches to resolution; and

- The estimated costs in money, time and stress if the case remains unresolved and must proceed to/through litigation.



One well-known mediator advises counsel to spend at least as much time preparing the client for mediation as counsel would spend in preparing the client for testimony at a deposition.<sup>15</sup>

### 3. Positive attitude toward mediation.

Adopting a positive view of the mediation process and an optimistic belief that results are achievable can have a significant outcome on the mediation. “Positive emotions elicit problem solving, creative brainstorming of ideas, and empathy for the perspective of the other parties.”<sup>16</sup> This does not mean being blind to the difficulties to be faced or to “put on a happy face.” But it does mean that a belief in the value of the process and a genuine willingness to participate can lead to a meaningful resolution. Such a belief implies a willingness to listen to the other side and to remain open to possibilities. It also implies a commitment not to try to “win” the mediation or to inflict pain on the other side.

Similarly, parties who endeavor to present themselves as open and likeable are more likely to achieve satisfactory results. One respected mediator has opined that plaintiffs who exude “integrity, presence and an ebullient spirit,” *i.e.*, characteristics which attract rather than repel, are more successful in mediations.<sup>17</sup> In this author’s experience the converse is equally true: defendants who exhibit warmth, understanding and respect for the other side are more likely to arrive at satisfactory resolutions.

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<sup>15</sup> Curtis, *supra*, at 29.

<sup>16</sup> Shapiro, *supra*, at 75.

<sup>17</sup> Curtis, *supra*, at 30.

#### **4. Choosing the right mediator.**

Selecting the right mediator for the particular case is also a key to success. In choosing a mediator, the parties and their counsel should carefully consider whether a mediator with a more facilitative or more evaluative approach is preferable, or whether a retired judge, with the authority that implies, is most appropriate. This requires a consideration not only of the issues in dispute, but also of the characteristics of the parties to the mediation and to what mediator characteristics the parties are likely to respond or react. In addition to mediation style, the parties should reflect upon whether the mediator should have subject matter expertise. In cases that involve difficult or complex technical or legal issues, subject matter expertise may be helpful either because the mediator will require less “education” or simply because the parties will feel greater comfort with the process knowing that someone with expertise is assisting the negotiation.

#### **5. Choosing the right time to mediate.**

Finally, selecting the right time to mediate can enhance the chances for success. While mediation can and does occur at any point during the life of a dispute, there are frequently important junctures that make resolution more likely. Every case is unique and there are no hard and fast rules, but mediation can be very effective before matters get into litigation and positions start to harden and costs start to mount. Unfortunately, in the employment context, employers often do not learn of a dispute until litigation has commenced or is about to commence.

Indeed, there are two significant aspects of employment cases that tend to dictate when mediation is most likely to occur and thus is most likely to be effective. First, employment cases tend to be fact-intensive. They usually involve numerous, often

ambiguous, events and multiple players. Thus, what factors led to the dispute, what the witnesses will say about the events or the parties, and how witnesses will appear to a judge or jury are of critical importance. It is often beneficial, therefore, for some fact discovery to have occurred so that the parties to the mediation will have at least a core of shared information as to what the evidence will be. Attempting mediation too early can lead to disappointment and even more mistrust among the parties.<sup>18</sup> Second, in several types of employment cases, particularly employment discrimination disputes, the law permits prevailing plaintiffs to recover their attorneys' fees based on the hours expended on the case. It is not uncommon that attorneys' fees may end up being a very large, even the largest, component in the plaintiff's recovery. If the fact intensive nature of employment disputes counsels against mediating too early, the threat of an attorneys' fees award counsels against mediating too late. In those instances where the attorney has expended large amounts of time in litigating the case, the plaintiff's desire to recover those fees can drive the case to conclusion even where the plaintiff's actual damages are relatively low. The optimal time to mediate the typical employment case, therefore, is often after the basic facts and evidence are known, but well before the parties have begun to expend significant time and resources in preparing the case for decision. At that point they should have sufficient information to assess the risks of further litigation without having expended so much that a compromise will feel like a loss.

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<sup>18</sup> Mediation can, however, provide a forum for sharing factual information in a confidential setting and thereby operate as both a cost-effective substitute for the litigation process even as the parties are attempting to resolve the dispute.

## **II. CONCLUSION**

Mediation is a cost-effective, flexible and increasingly preferable alternative to litigation. Done correctly, it can provide the parties with a strong sense that they have controlled both the process and the outcome, and can lead to creative solutions that would not easily be achieved in the courtroom. Too often, however, parties and counsel do not spend the time necessary to prepare for the mediation or to assess their real interests and the risks they face or bring to the mediation attitudes and behaviors that are antithetical to resolution. But with adequate preparation and the right attitude toward the process, the parties can achieve lasting resolutions that they respect and with which they can be satisfied.