# SUCCESSFUL EARLY MEDIATION OF DISABILITY INSURANCE CLAIMS

## - A Mediator's Perspective -

**Doug deVries, Mediator**

**deVries Dispute Resolution / Judicate West**

**California**

Presented at

**American Conference Institute**

**17th NATIONAL ADVANCED FORUM ON LITIGATING DISABILITY INSURANCE CLAIMS**

Philadelphia, PA - January 23, 2015

**Introduction**

Mediation of litigated cases started approximately 25 years ago and its use has since expanded and become institutionalized, including court-imposed procedures and the advent of alternative dispute resolution companies. Statutes and court rules have evolved to define the nature of litigation-related mediation and to establish and protect the confidentiality of mediation proceedings. Courts are mandating that parties engage in alternative dispute resolution at the early stages of litigation, and a related increase in the use of voluntary early mediation in litigation, and pre-litigation, is now a significant trend.

The Florida court system embraced implementation of mandatory early mediation in litigation as early as 1989 and one of the consequences has been an increase in pre-litigation voluntary mediation. See e.g., Press, *Institutionalization: Savior or Saboteur of Mediation?*, Florida State Univ. Law Review, Vol. 24, No. 4, p. 903 (Summer 1997). At least one study has found that corporate legal departments now generally view early mediation as an effective means of risk management and litigation cost reduction. See Stipanowich and Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1000 Companies*, 19 Harvard Negotiation Law Review 1 (2013).

Disability insurance cases arise from an insurer's allegedly unjustified denial of disability insurance benefits; they are by their nature complex and challenging. Disputed issues typically involve insurance policy or plan term interpretation, medicine and/or psychiatry, occupational and earnings analysis, appropriate law and forum selection, benefit valuation, policy or benefit "buy out," interest and present value discount calculations, among others. If federal law (ERISA) applies, there are potentially disputed issues concerning preemption, insurance savings clause, appropriate standard of judicial review, discovery rights, statutory attorney fees and equitable rights and remedies among others. If state law applies and insurance is involved, there may be disputed issues relating to first-party insurance bad faith remedies, including quantum of proof and attorney fee, emotional distress and punitive damages.

When mediations are convened in such cases prior to a lawsuit being filed or early in the litigation process additional process-related complexities and challenges are presented. This article will discuss these complexities and challenges and offer suggestions on how best to prepare for, participate in and enhance the potential success of early mediation. In that regard, the external pressures that might otherwise foster a sense of immediacy about finalizing settlement negotiations, such as impending dispositive motions, expensive expert discovery or trial, are not looming over the negotiation when early mediations occur. In their absence, a premium is placed on preparation, information exchange, realistic assessment and a positive commitment to reasonable negotiation.

**Is The Case Appropriate For Early Mediation?**

If early mediation is ordered by a court, the case becomes "appropriate" for early mediation whether it is or is not ready as a practical matter. In that circumstance, since there is no choice, counsel and their clients typically approach early mediation in one of three ways: (1) close-minded and

compromise-resistant coupled with an intent to just go through the motions in order to at least procedurally comply with the court's directive; (2) neutral mindset, but with a resolve not to compromise positions or the will to "fight it out" if necessary, or (3) open-minded about compromise coupled with an intent to reasonably and fully explore potential early settlement. There are variations, but these generally describe the major alternatives. As might be expected, the chances of either voluntary or mandatory early mediation producing an agreed settlement, while not guaranteed, are enhanced when the intentions of the parties more closely fit the description of the third alternative.

Correspondingly, where the particular case falls on the intent continuum usually depends on the answers to a simple set of questions, as follows:

- Is plaintiff counsel's intent or attitude toward early mediation positive?
- Is the plaintiff's intent or attitude toward early mediation positive?
- Have plaintiff and plaintiff's counsel reached a positive mutual accord about early mediation?
- Is the insurer committed to a reasonable attempt to achieve early settlement?
- Do the disputed issues, factual and legal, present a good fit for early mediation?
- Can settlement evaluation be sufficiently accomplished by both sides without discovery?
- Are the parties ready and able to reasonably and *realistically* negotiate?

If the answer to all these questions is "No," early mediation may be thought "inappropriate" in the sense that the likelihood of productive negotiation culminating in an early compromise settlement seems improbable. If the answer to all the questions is "Yes," which is more likely when early mediation is a product of mutual agreement, the prospects for a successful early resolution are enhanced (albeit not guaranteed).

On the other hand, cases can and do settle in the course of early mediation regardless of the initial mindset of participating counsel and clients and regardless of whether the mediation is voluntary or mandatory. Along with the court mandate comes an expectation of good faith participation (even if only in the form of an informal expectation monitored by a court's ADR coordinator). Professional mediators also tend to take their work and ethical obligations seriously and are typically resistant to the notion of conducting sham mediations. So, even if the early mediation is not voluntary, and whatever counsel's initial strategic intent, good faith participation in early negotiation is encouraged. In other words, even in the face of initially negative answers to the early mediation screening questions posed above, preparation for a productive early mediation may be enhanced by a good faith effort to move the answers to each question, to the extent possible, toward the positive.

Regardless of whether early mediation of a disability insurance claim is voluntary or mandatory, there are numerous potential advantages that may provide incentive for both claimants and insurers.

Claimants can, for instance:

- better manage risk and uncertainty;
- avoid the burdens of litigation, both emotional and practical (including costs);

- avoid the delays and uncertainties of outcome associated with disputed litigation;
- get money they are seeking sooner;
- obtain finality and closure sooner;
- possibly lower attorney fees exacted on early settlement;
- secure mutually agreed confidentiality, if it suits them.

Insurers can, for instance

- better manage risk and outcomes;
- avoid the expense of protracted litigation, including attorney fees and costs;
- avoid the uncertainties of litigation, including adverse outcomes and their potential secondary effects, such as negative publicity or undesirable precedents;
- obtain finality and release reserves established on claims;
- obtain mutually agreed confidentiality, if it suits them;
- avoid expensive and/or intrusive discovery;
- put existing relationships with repeat plaintiff lawyers to productive use.

Whether considered unilaterally or mutually, consideration of such potential advantages suggests that early mediation at least presents the potential for reaping real benefits if pursued diligently and reasonably.

**Is Early Mediation Always Better?**

Studies have shown that litigated cases are settled more than 92% of the time and that results obtained at trial rarely validate the settlement positions of both sides – one side's evaluation of the case is usually incorrect due to miscalculation of risk or value, or both. For instance, a study of New York State trials in 2005 found that plaintiffs were wrong about outcome more frequently than defendants (61% to 24%), but defendants were more frequently wrong about the value of cases ($1,100,000 versus $43,000 on average). See e.g., Kiser et al., *New York State 2005 Trial Result Study*, J. Empirical Legal Studies, Sept. 2008. Given these numbers, when considered in the aggregate, only a small percentage of cases ever get to trial and when they do one side or the other, or both, has assessed their case incorrectly (when success is measured by outcome relative to settlement position). This means that there should usually be ample incentive for early settlement since more often than not the significant time, effort and money expended over the course of litigating a case is ultimately proved to be wasteful and unproductive for one side or the other. These aggregate tendencies may provide incentive for early settlement for both the insured and the insurer - for the insured avoidance of unproductive costs and fees may result in a larger net recovery, and for the insurer such avoidance contributes to overall reduction of claim-related expense, including payment of adverse outcomes.

The adage that every person's disability claim is unique also applies generally to the assessment of whether early mediation of such cases is always better – it depends on the case. A number of questions may be asked in order to determine whether early mediation is better than later mediation for any particular case, as follows:

- Are important facts so disputed or undeveloped that specific formal discovery is required before reasonable and realistic evaluation of the case can be accomplished?
- Are important legal issues so disputed or uncertain that judicial determination is required before reasonable and realistic evaluation of the case can be undertaken?
- Are there anticipated precedential rulings or other developments external to the case that must be available before the parties can reasonably and realistically evaluate their positions?
- Is it highly probable that anticipated court rulings will completely dispose of the case?
- Are punitive damages a seriously contested issue in the case?
- Is there significant pre-existing hostility between the participants (counsel or parties) that will prevent reasonable and realistic early negotiation and needlessly increase antagonism going forward?
- Will the people with full authority to negotiate be available and directly participate?

As with questions concerning the initial parties' intentions, so here the answers to these questions do not completely predict the answer to the larger question of whether early mediation is better. For instance, there may be other specific factors at work; one example is the disability insurance policy "buy out" situation. Where the monthly disability insurance benefit is high and the duration of potential benefit payments is long, the resulting lump sum present value calculation will be predictably large. Actuarial considerations will cause the insurer to reduce the present cash value by more than the mere application of a market-based discount rate in order to account for a mortality factor. In addition to creating the potential for disparate benefit value calculations this same factor can provide a disincentive to the insurer buying out in the short term what is a contingent long term future benefit stream that may not otherwise have to be paid out in full over the entire future benefit duration period.

Disputes between the parties about the facts and about legal issues are common at all phases of a litigated case regardless of how much discovery has been completed, how poorly witnesses do at deposition, how much the expert witnesses disagree, or how threatening an anticipated motion ruling may be. Disability insurance cases, like most cases, rarely settle because one side accepts the inevitability of defeat - hope of prevailing is the last thing litigators (and usually their clients) are willing to abandon. In fact, regardless of when the mediation takes place in the course of the litigation, attempts to dissuade a party by convincing them they are wrong is typically met by "duck and cover" responses - the mediator tends to hear from counsel that there is yet another fact, another witness, another case citation, a jury that will surely sees things their way and in the end there is always appeal.

Dispute and uncertainty are an inherent part of litigation, and even though they may be perceived as negative obstacles, they are also at the heart of successful mediations because dispute and uncertainty foster risk, which in turn affects value, and which should encourage realistic compromise. Mediation does not directly resolve the disputes between parties nor does it make binding determinations of fact or law, so those problems and issues will still exist in the absence of a mutually agreed resolution. The goal of mediation is to reach settlement by agreement in the very face of the parties' entrenched positional disagreements, and mediation generally does this very well – multiple

studies and reports have confirmed the success rate of mediations in the 80% plus range. It should be possible to accomplish a realistic assessment of risk and value at any stage of a case, including early mediation.

**What Is The Role Of The Mediator In An Early Mediation?**

The role of the mediator in an early mediation is generally the same as in any mediation at any stage of litigation – primarily the facilitation of negotiation and secondarily the evaluation of party positions. However, early mediation may, depending on the nature of the case, the parties, the counsel and the mediator's style, involve some change in mediation technique and emphasis.

The two main mediator styles in money-based negotiations, the typical mediation seen in disability insurance and insurance bad faith litigation, are "facilitative" and "evaluative." A primarily facilitative mediator views their role as helping or guiding the parties and counsel through the process of negotiation. A primarily evaluative mediator views their role as directly influencing the parties' assessments of their rights-based conflicts. It is difficult if not impossible for a mediator to use one style to the exclusion of the other in a money negotiation, and the parties and counsel not infrequently look to the mediator for evaluative input and direction.

Another common style of mediation is cooperative or integrative mediation in which the parties are guided in identifying problems and issues followed by identification of all possible solutions or answers from which mutual agreements may be fashioned. This type of negotiation is seen in community and family mediation, but not commonly in pure money negotiations. However, elements of it may come into play when there are also non-monetary considerations, especially when the relationship of disputing parties will, or may, continue after the lawsuit is resolved. Also, there may be an increased integrative role for the mediator to play in helping the parties in their preparation for early negotiation and in follow up after an early mediation session.

In an early mediation, the parties are going to engage in negotiation either prior to a lawsuit being filed or near the beginning of litigation. As a result, much if not all of the work to be done by the adversarial litigating parties to test their positions and resolve or to narrow disputes has yet to occur. In this setting, the dynamics of the negotiation (if it is to be successful), and therefore the role or function of the mediator, have the potential to change in a variety of ways, including the following:

- Increased emphasis by the parties on selecting a mediator with expertise in the specific subject matter of the case (e.g., disability insurance litigation under state law and/or ERISA);
- Increased emphasis by the parties on selecting a mediator with actual experience litigating such cases, whether as an advocate or judge;
- Increased use of integrative mediation techniques to identify and organize issues and potential solutions;
- Increased pressure on the mediator to engage in evaluative mediation techniques (with attendant ability to be conversant about the facts and applicable law);
- Potential increased need for the parties and counsel to engage in abstract "decision analysis" involving presumptive risk-assessed valuation with the assistance of the mediator;

- Increased pressure on the parties to fully and realistically prepare their analyses of disputed points of fact and law;
- Increased importance of sharing information about positions and the support for positions between and among the parties prior to the mediation session, if possible (and well in advance, if possible).
- Potential increased need for pre-mediation contact with counsel to "set the stage" for productive negotiation, including encouragement of pre-session preparation and sharing of briefs and key documents, and assuring that decision-makers with authority will be in attendance.

**How Does The Mediator View Their Role In An Early Mediation?**

The mediator's role in early mediation starts with achieving the same objectives to be established in any successful mediation - securing the trust and respect of counsel and parties early in the process and maintaining neutrality, integrity and credibility in assisting the parties throughout the mediation. In terms of structuring negotiation and moving it forward to a successful conclusion, the early mediation places additional emphasis on the following:

- Understanding and confirming the accuracy of the parties positions on the numbers at issue – for instance, gross monthly benefits (and monthly Pre-disability Earnings, if relevant), "other income" offsets (if applicable), net monthly benefits, applicable interest rates on past benefits, present value of future benefits at issue, if any, additional economic damages, if any (such as attorney fees and expenses);
- Understanding and confirming what substantive and procedural law is to apply (e.g., under state law or ERISA) and whether extra-contractual remedies and damages are potentially in play (such as emotional distress, punitive damages, etc);
- Identifying all issues, disputes and uncertainties of outcome presented;
- Identifying all "below the line" personal or business interests that may be at play (both monetary and non-monetary);
- Identifying all decision-makers and decision-making processes on all sides of the dispute, and strongly encouraging their participation (such as, on the insured's side, family members, friends or lay advisors in addition to the insured and counsel, and on the insurer's side, the company representative's title or position within the company, negotiating authority procedures, and personal style and attitude);
- Educating the parties and counsel, as necessary, regarding all negotiating options that may be available, including especially the options that may be employed to confront and successfully overcome impasse as it arises, as it usually does in money negotiations;
- Reminding the parties that negotiation, especially early negotiation, can be difficult, and that all of the progress that may be occurring in the negotiations may not be reflected in the formal exchange of demands and offers (numbers do not necessarily tell the whole story during the course of negotiations!)

- Follow up after the mediation session itself has been completed until it has been determined that (a) there is a settlement, (b) all possibility of settlement has been exhausted or (c) counsel and the parties do not want further mediator follow up (in this regard, if appropriate to the situation, a process should be proposed and agreed to between and among counsel and the mediator to structure the follow up and establish dates for completion of same – this might include further research, obtaining more authority, conducting discovery, consulting with an expert, filing a motion, etc).

**What Should Early Mediation Focus On, And How Best Prepare?**

The purpose of early mediation, whether voluntarily agreed to by the parties or mandated by a court, is to fully explore the potential for settlement of the dispute and hopefully achieve settlement by mutual agreement. It stands to reason that, like mediation in general, the focus should be on realistic case assessment and good faith negotiation undertaken by participants who have full authority to negotiate and conclude a settlement.

However, as noted above, early mediation presents some unique circumstances and challenges. For instance, there can be resistance to early compromise in general or there may be a specific concern that settlement prior to completion of particular discovery is premature (depending on the case, this aspect may be viewed by counsel as implicating professional standard of care compliance concerns). When suit is filed before an insurer has actually denied a claim, such as occurs when bad faith delay of claim determination prior to actual denial is alleged, the process becomes complicated by the insurer having to defend the lawsuit while the claim is still open. Similarly complicated is the situation in which an ERISA claimant institutes litigation before an administrative appeal determination is completed or before all categories of disability benefit eligibility are determined (as when a denial of "regular occupation" benefits does not reach the issue of entitlement to future "any occupation" benefits).

If the potential for success of the early effort is to be realized, counsel and the parties should make a good faith effort prior to the early mediation to accomplish the following:

- Develop a positive attitude toward early case resolution (this does not mean giving up on one's positions or conceding the opponent's positions; it means approaching the mediation process with a constructive frame of mind to enable maximization of the settlement opportunity that may be presented);
- Put aside any petty, and even not so petty, differences with opposing counsel and the adverse party that have the potential for interfering with one's processing of, analysis of and ultimately acceptance of a settlement opportunity (anger, for instance, has the potential to engender irrational thought as a obstacle to satisfaction of even one's own best interests);
- Undertake a serious effort to fully explain the process and potential objective of early mediation to clients, including the unique nature of lawsuit-related money negotiations and how they differ dramatically from other more familiar negotiations, such as buying a house or a car (attorneys and insurers are of course familiar with this, but lay people are not unless they have prior experience);

- Make a serious effort to explain to clients the nature of uncertainty and risk and their impact on potential recovery, including the realities of litigation;
- Fully explore what mediators call the BATNA, WATNA and MLATNA (Best Alternative To A Negotiated Agreement, Worst Alternative To A Negotiated Agreement and Most Likely Alternative To A Negotiated Agreement);
- Assess and advise about the potential impact of future incurred litigation expenses and attorney fees (on the client's net recovery in the case of the insured; insurers and defense counsel budget as a matter of course);
- Assure that the numbers at issue are accurate and complete (e.g., past and future benefits calculations, interest, fees, etc.);
- Fully analyze all aspects of the case and realistically assess one's positions, acknowledging to oneself all disputed issues and attendant uncertainties – good, bad or otherwise – and explain same to the client (insurers and defense counsel tend to do this as a matter of course);
- Fully analyze and realistically assess the potential impact of future events, such as potentially adverse discovery, law and motion rulings, jury verdict and appeal;
- Fully explore with the client who the real decision-makers are and how they will participate in the early mediation and impact the negotiation process, including final decisions;
- Fully explore with the client the existence of any "below the line" personal or business interests, including non-monetary interests and considerations, that may be affecting their thinking or goals and that may drive their attitude about the negotiations (there are an infinite number of examples, but for simplicity's sake: for insureds this could include such things as an immediate need for a particular amount of money, or a need for closure, or a desire to rid themselves of further interaction with the insurer; for the insurer this could be a desire not to set a precedent, or a desire to avoid embarrassing or disruptive discovery or a desire to avoid unfavorable publicity);
- Exchange the complete claim file (or "administrative record" if ERISA) well in advance of the early mediation;
- Exchange all other relevant documents, information and analysis that support the positions you expect to assert; in disability insurance cases, it is particularly important to fully analyze all aspects of the complete insurance policy or benefit plan, including insuring clauses, definitions, limitations, exclusions, offsets and standard of judicial review as well as required notice and proof of claim provisions, burdens of proof and the evidentiary support for the claim and its denial (see also discussion of early mediation briefing, below);
- Reach informal (non-binding) agreements about peripheral issues and disputes to the extent possible prior to the mediation, especially those that while not necessarily trivial should not impact the overall settlement evaluation substantially;
- Informally discuss with opposing counsel how one believes the early mediation should best proceed and agree on the overall approach and procedure (e.g., should a demand be made prior to the session, will there be a responsive offer prior to the session, will people with the necessary level of authority be present, will there be a joint session to start the proceedings – these are things mediator pre-session calls to counsel may also address);

- Determine by agreement whether some particular discovery (informal or formal) is necessary to complete reasonable preparation for negotiation.

Undertaking and accomplishing all of these activities and efforts will operate to enhance the process of early mediation. However, even though this is true of ideal preparation for any mediation at any stage of litigation, the fact is that most participants in mediations do not accomplish all of them. So, even if all cannot be accomplished, an effort to accomplish as many as reasonably possible will still have a beneficial effect.

**Some Tips, Strategies and Best Practices For Early Mediation?**

**Case Screening:** In order to get the most out of early mediation, start by trying to objectively answer the screening questions suggested above in order to analyze the general appropriateness of early mediation and to evaluate whether earlier mediation of the case may be as appropriate as later mediation. Then rethink the situation realistically and undertake a reasonable effort to adjust one's thinking and state of preparation in the direction of improving the potential for success of the early mediation process. If the early mediation goes forward, undertake and accomplish as many of the preparation activities suggested above as reasonably possible. While completing these preliminary steps will not assure that settlement will be achieved, it will enhance the process and the opportunity to experience a successful early mediation.

**Process Orientation:** Try to gain a better understanding of what an effective mediator does to facilitate the negotiation process and how the mediator's efforts might be supported. An effective mediator can function as an asset for both parties to a negotiation – after all, the mediator's role, by definition, is that of a neutral facilitator. For a detailed discussion of this topic, see deVries, *Mediation: Understanding Facilitative, Evaluative and Directive Approaches*, at www.dkdmediation.com/articles.

Many participants in mediation mistakenly think that the primary role of the mediator is to convince the opposing party that their positions are incorrect and unsupportable. While many mediators can be evaluative (especially those with substantive subject matter expertise), there are three essential shortcomings inherent in placing too much reliance on this approach as a negotiation strategy. First, both sides want the mediator to do that same thing – "beat on" the opponent – and as noted above, participants rarely abandon their positions or concede the correctness or strength of the opponent's position in the course of negotiation. Second, counsel and parties invariably possess more detailed knowledge of their case than the mediator does, no matter how long the briefs or how diligently the mediator prepares, a circumstance that produces the "duck and cover" dynamic when a party's positions are challenged. Third, when a mediator "beats" too hard on an opposing party it may be perceived by that party as advocacy, which is the role of counsel, not the mediator (whose proper and ethical role is neutral even-handed facilitation); if a mediator loses the trust and confidence of either party, it is a disservice to the process and the parties. It is the parties themselves who can best support and undermine positions asserted in the dispute, and the parties can enhance their negotiating positions during mediation by preparing and sharing information in advance of the early mediation session.

**Mapping:** Prior to and throughout the course of a mediation session effective mediators engage in a process known as "mapping," which involves first identifying the issues, the parties' positions on those issues and the anticipated problems raised by those positions, and then developing a plan and agenda for moving negotiations forward toward resolution. The focus of mapping is on the future, making positive negotiating gains and ultimately achieving success in the form of agreed settlement (almost invariably this process also involves mediator guidance in anticipating, meeting and overcoming impasse, a detailed discussion of which is beyond the scope of this paper). Counsel can enhance the early mediation process by learning about mapping and applying it to their own case and their own perceptions and strategies about the early negotiation, including assessing, weighing and prioritizing theories and claims; in effect, "self-mapping." Doing so will increase the likelihood that counsel will proceed with early mediation in an organized, prepared and proactive manner. As the saying goes, it helps to know where you want to go (and what you want to achieve) before starting your journey. As with some other aspects of preparation for mediation, insurers and their counsel tend to do this as a matter of course.

**Information Sharing:** In the context of pure money negotiations, which is the predominant type of negotiation in disability insurance cases, it makes sense for the parties to share information and views with each other both before and during the mediation session, not just unilaterally and confidentially with the mediator. As a general proposition, the basic dynamic in litigation-related money negotiation is rather simple – plaintiff wants money from defendant and as much of it as they can get, and defendant either does not want to pay money to plaintiff or wants to pay as little as possible. It is only logical in this circumstance that the plaintiff tell the defendant what they want and why they should get it, and the defendant correspondingly tell plaintiff why they do not deserve it, in whole or in part. The mediator, of course, is not a party, has no money to pay and no authority to either decide the outcome or compel any payment.

In spite of these simple truths, the parties to disability insurance mediations frequently do not make pre-session demands or offers and do not share mediation briefs. This is apparently driven by a mutual distrust and a desire to avoid educating the opponent about the case in general, factual and legal analysis in particular and potential strengths and weaknesses overall. However, the insurer and its counsel routinely evaluate the dispute in a process that results in fixing a target settlement value and corresponding settlement authority in advance of mediation, typically by committee or an ad hoc meeting of key personnel. If the insured does not communicate information to the insurer prior to an early mediation, the insurer will obviously complete its evaluation while focused on its own position and without the plaintiff's input, all at a time preceding discovery. Since this is the first, and only, time prior to an early negotiation that the insured can further impact the insurer's case assessment, the better practice for claimants' attorneys is to submit information to the insurer that has the potential to influence the insurer's assessment well in advance of mediation. This means transmitting information sufficiently in advance in order to accommodate the insurer's internal evaluation procedure and schedule (from the insured's perspective, the impetus for doing this is not merely to serve the insurer's needs, but rather the insured's self-interest in trying to extract a better offer).

While understandable in the context of adversarial advocacy, the withholding or hiding of information also potentially undermines the efficiency of the early mediation process and the effectiveness of negotiation (including the mediator's role). Failure to exchange briefs prior to the mediation session can result in too much emphasis being placed during the mediation session on communicating and exploring the parties' adversary positions. This often takes a considerable amount of time and effort, which can distract from engaging in and advancing meaningful negotiation about money (which is the ultimate objective of the mediation session). Further, too much attention on asserting positions, attacking positions, defending positions and restating positions (which, as noted above, tend not to change, be accepted or be abandoned in any event) only serves to reinforce and entrench parties' positions, disagreements and disputes, and at worst create or reinforce animosities. This in turn results in "anchoring" the negotiations on the wrong thing – adversarial disagreements – instead of the right thing – forward looking negotiations and resolution.

**A Two Brief Solution:** Parties may want to provide a mediator with information only on a confidential basis, and sometimes information that may be useful to the mediator's efforts to assist the parties is not communicated at all. Rather than foregoing exchange of briefs, parties should consider submitting two different mediation briefs in order to enhance the mediation process - one shared with opposing parties and the other submitted confidentially to the mediator. Each of the two briefs has a different purpose and is correspondingly aimed at a different reader. The shared brief serves the function of advocacy and focuses on facts, law, analysis and argument in furtherance of an attempt to influence and undermine an opponent's thinking and confidence (and also, of course, to inform and influence the mediator's perception of the controversy). The confidential brief submitted to the mediator can, and should, serve different purposes, such as (1) communicating useful information to the mediator that one does not wish to share with an opponent, (2) informing the mediator about any problems the parties have had, or may have, in communicating and negotiating, (3) identifying any known or suspected obstacles to overcoming anticipated impasse or achieving an agreed resolution, and (4) advising the mediator about any "below the line" personal interests, needs or goals that are not involved directly in the dispute, but might influence the negotiation. This brief should be short and concise and be organized to inform the mediator about practical issues and problems together with the party's suggestions, if any, about how they think they might be addressed, keeping in mind that the mediator's primary role is facilitation, not advocacy or adjudication, as discussed above.

**Decision Analysis:** In litigation, it is generally understood and accepted that risk negatively impacts case value; uncertainty of outcome carries with it attendant risk and diminution of case value whenever a disputed issue must be confronted. One method utilized to assess the impact of risk on value is known as "decision analysis," "decision tree analysis" or "risk-assessed valuation." Essentially, it involves ascribing an ideal or no-risk value to claims and then applying an estimated percentage chance of success to each ideal claim value to produce a risk-assessed value – for instance, if one had a single cause of action estimated to be worth $100,000 and the probability of success at trial was estimated to be 75%, the risk-assessed value would be $75,000. In addition, since the effect of multiple risks is cumulative it must be multiplied – for instance, if that same claim would predictably be appealed, and the probability of success on appeal was estimated to be 50%, then the $75,000 trial value would be

reduced in half to $37,500 ($75,000 x .50). Overall, the risk calculation would look like this - $100,000 (ideal value) x .75 (trial probability) x .50 (appeal probability) = $37,500 (risk-assessed claim value).

The point of such an abstract valuation exercise is preparation, not prediction. It is merely used to self-test various assumptions about risk and is not intended to predict actual outcome or actual settlement value, and should not be used rigidly. Likewise, its results are not intended to be shared with a mediator or with an opposing party (that is, unless it is advantageous to use one's own calculations to rebut an opponent's unfavorable valuation). Decision analysis is somewhat controversial; it has been criticized as being speculative, easily manipulated, too mechanical; it has also been criticized by some as favoring a defense approach and by others as incapable of taking into account the many variables that affect trial results. However, its usefulness in preparing for early mediation is two-fold: (1) enabling one to roughly organize thoughts about potential case value in anticipation of a negotiation that will be occurring prior to actually engaging in the litigation activities that normally would inform the assessment of the allegations and defenses – e.g., discovery, motions and ultimately trial; and (2) explaining and illustrating to a client the nature of anticipated litigation risks and their impact on potential case value.

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