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## Avoiding Pitfalls: Common Reasons for Mediation Failure and Solutions for Success

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# AVOIDING PITFALLS: COMMON REASONS FOR MEDIATION FAILURE AND SOLUTIONS FOR SUCCESS<sup>1</sup>

JACK G. MARCIL<sup>2</sup> AND NICHOLAS D. THORNTON<sup>3</sup>

## I. INTRODUCTION

In mediation, the primary focus of the mediator is to encourage the disputants to communicate with each other concerning the dispute.<sup>4</sup> Without an effective channel of communication between the disputants and a commitment to resolve the matter, mediation will most likely fail. When mediation sessions are not going well, disputants often feel discouraged, frustrated, or disenchanted, which may lead the disputants to either act more obstinately towards each other or to withdraw altogether from the mediation.

This article discusses fifteen common reasons that some mediations are unsuccessful, and, in the authors' view, methods in which those problems may be avoided. While some may criticize this unscientific analysis,<sup>5</sup> this

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The views and opinions expressed herein are those of the authors only. As such, the views and opinions should not be construed as the position or opinion of the Serkland Law Firm or the North Dakota Commission on Legal Counsel for Indigents.

4. See N.D. R. Ct. 8.8(a)(1)(A) (defining mediation as an alternative dispute resolution "process in which a non-judicial neutral mediator facilitates communication between parties to assist the parties in reaching voluntary decisions related to their dispute"); see also DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS* § 2.0, at 39 (1996) (noting that the mediator's overall goal in mediation "is to stimulate constructive negotiations").

5. See, e.g., Russell Korobkin, *Psychological Impediments to Mediation Success: Theory and Practice*, 21 OHIO ST. J. ON DISP. RESOL. 281, 281 (2006) (noting that practice-oriented media-

article provides pragmatic advice based on practical, real world experience.<sup>6</sup> This article is not intended to provide an exhaustive statement of reasons why mediations might fail. After decades of research on mediation and other alternative dispute resolution processes, it still remains unclear why some cases reach settlement and others do not.<sup>7</sup> However, based on the authors' practical experience,<sup>8</sup> the goal of this article goal is to identify common causes of mediation failure, discuss methods that the authors have found useful to avoid or overcome those problems, and to share those tools with other mediators, attorneys, and disputants to provide them with the best opportunity for a successful mediation.<sup>9</sup>

## II. COMMON CAUSES OF MEDIATION FAILURE AND SOLUTIONS FOR SUCCESS

No matter what one calls it—impasse, deadlock, stalemate, standoff, standstill—reaching a point in a mediation where the disputants are either unable or unwilling to communicate with each other and to reach a mutually acceptable resolution of their dispute can be a obstacle in every mediation. Depending on its severity, impasse may result in obstinate behavior of the disputants, or in the disputants terminating all options short of full-blown litigation. Impasse might arise from the mediation process

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tion literature “can suffer from reliability or representativeness problems” in that the observations of the author “might be idiosyncratic, biased, or otherwise different” from others in the author’s position, and that small numbers of anecdotal information “might be idiosyncratic and their lessons not broadly generalizable”).

6. In general, mediators are required to maintain the confidentiality of anything relating to a mediation. *See, e.g.*, N.D. R. CT. 8.8(d) (North Dakota’s general confidentiality rule); MINN. GEN. R. PRAC. 114.08 (Minnesota’s general confidentiality rule). *But see, e.g.*, N.D. CENT. CODE § 31-04-11 (2007) (providing that certain information disclosed in mediation is admissible and may be compelled by subpoena in a subsequent civil proceeding); N.D. CENT. CODE § 14-09.1-06 (providing that any communication in a contested child proceeding mediation is confidential, inadmissible, and not subject to compulsion by subpoena); MINN. GEN. R. PRAC. 114.10 (providing exceptions to the general confidentiality rule). Any examples used in this article will be generalized or fictionalized to maintain confidentiality.

7. *See* Douglas A. Henderson, *Mediation Success: An Empirical Analysis*, 11 OHIO ST. J. ON DISP. RESOL. 105, 105 (1996).

8. The authors’ experiences are primarily drawn from mediations in cases involving contracts or torts where the disputants have little interest in preserving a relationship. The common causes of mediation failure discussed here may not be applicable to situations.

9. The authors recognize that “successful mediation” is a malleable term and that each dispute has unique characteristics. In one instance, merely getting the disputants in the same place at the same time for a mediation session might be considered a successful mediation. In other situations, the disputants might define a successful mediation as nothing short of reaching full and complete settlement of the entire matter. For the general purposes of this article, and from a mediator’s perspective, a successful mediation is one in which the disputants leave the mediation having come to a reasonable and mutually acceptable agreement that resolves the essential issues.

itself,<sup>10</sup> some psychological impediment to a successful mediation,<sup>11</sup> or some barrier concerning the merits of the dispute.<sup>12</sup>

In the view of the authors, there are fifteen common reasons mediations fail. These reasons include: (a) an inappropriate mediator has been chosen to mediate the dispute; (b) the disputants do not have a commitment to resolve the dispute; (c) mediations are ordered by the court; (d) the mediator, attorneys, or disputants fail to adequately prepare for the mediation; (e) the mediation statements, positions, and interests are not fully developed, complete, and disclosed to the mediator prior to the mediation; (f) the mediator, attorneys, and the disputants fail to anticipate potential issues that may result in impasse and discuss rules or methods to address impasse before it occurs; (g) there are settlement conferences scheduled after the mediation; (h) mediation is premature in that there are outstanding discovery issues, records review, investigation, or pending motions with the court; (i) a previous offer was made by a representative and exceeds the settlement authority given to the attorney at the mediation; (j) the claimant increases the demand at the mediation; (k) in cases where there are multiple defendants, the disputants fail to consider contribution issues prior to the mediation; (l) in cases where insurance companies or other third party payers are involved, the plaintiff fails to consider and address subrogation issues before the mediation; (m) the parties present at the mediation do not have sufficient settlement authority; (n) the person or persons with settlement authority fails to attend the mediation; and (o) there is a failure to properly document a settlement in mediation.<sup>13</sup> Below, the authors discuss common reasons for mediation failure and suggest methods that mediators, attorneys, and disputants can attempt to overcome those barriers to mediation success.

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10. See, e.g., GOLANN, *supra* note 4, §§ 6.0-6.8, at 153-85 (discussing “process obstacles” to mediation); see also Henderson, *supra* note 7, at 118-21 (utilizing procedural features of mediation as variables in an empirical analysis of mediation success).

11. See generally, Korobkin, *supra* note 5, at 284-321 (outlining four psychological biases that potentially impede mediation success: optimistic overconfidence, attribution biases, framing effects, and reactive devaluation); see also Russell Korobkin, *How Neutrals Can Overcome the Psychology of Disputing: The Effect of Framing and Reactive Devaluation in Mediation*, 24 ALTERNATIVES TO HIGH COST LITIG. 83, 83-86 (May 2006) (providing hypothetical examples of how mediators might approach potential psychological barriers in a mediation).

12. E.g., GOLANN, *supra* note 4, §§ 8.0-8.5, at 217-41 (discussing “merits barriers” that can potentially affect mediation success).

13. E.g., *id.* §§ 6.0 - 8.5, at 153-241.

### A. APPROPRIATENESS OF MEDIATOR

Selecting an appropriate mediator for the type of dispute is essential to providing disputants with the highest probability for a successful mediation.<sup>14</sup> Even though a mediation is essentially a disputant-driven process, a mediator's knowledge, experience, skill, and approach to a dispute has a significant impact on the outcome of the mediation.<sup>15</sup> "Common wisdom holds that a mediation is only as good as the mediator, with the following attributes critical in overall mediation success: intervention techniques employed (aggressiveness and diversity of techniques); demographic characteristics (age, experience, functional specialization); and overall quality of mediators."<sup>16</sup>

While some mediators may believe that they can mediate any dispute, most try to mediate disputes in areas in which the mediator has a considerable amount of substantive experience. To a large extent, however, the disputants and the attorneys that select a mediator bear the burden of choosing an appropriate person to mediate their dispute. Before agreeing on a particular mediator, the disputants and their attorneys should research the mediator's experience, expertise, costs, style, personality, and temperament. The attorneys may also want to interview the mediator about his or her experience and qualifications prior to hiring a mediator, which gives the attorneys an opportunity to feel out the mediator's style and temperament.<sup>17</sup> An appropriate mediator—a mediator respected by all people involved in a mediation—can work through difficult issues carefully and delicately to avoid or overcome any barriers to a successful mediation. Accordingly, the disputants and attorneys should take great care choosing a mediator.

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14. By "appropriate mediator," the authors do not intend to say a qualified mediator is incapable of mediating a dispute. Mediation is a dynamic process, and its success often depends on the interrelation of a host of fluid variables. An appropriate mediator is a mediator with a proper combination of characteristics, including sufficient knowledge, training, experience, and skill, combined with the temperament and ability to handle the type of disputants involved. *See, e.g.*, GOLANN, *supra* note 4, § 1.3, at 33-37 (discussing potential vulnerabilities of mediators). In other words, since each dispute poses unique challenges, an appropriate mediator is one who is prepared to address the challenges presented in that particular mediation.

15. *See* Henderson, *supra* note 7, at 113-17 (discussing the characteristics of a mediator or co-mediators which may potentially affect the outcome of a mediation).

16. *Id.* at 113.

17. In some states, mediators are required to provide disputants with a written statement describing the mediator's qualifications, educational background, and relevant training and experience in the field. *See, e.g.*, MINN. STAT. § 572.37 (2000) (declaring it a petty misdemeanor for a mediator to fail to provide the disputants with the mediator's written qualifications prior to beginning the mediation). There is no such requirement in North Dakota, but mediators practicing in both North Dakota and Minnesota often send a written statement of their qualifications as a matter of course. The authors suggest that mediators provide written qualifications to disputants regardless of whether it is required.

## B. COMMITMENT TO RESOLVE THE DISPUTE

For mediation to be successful, the disputants must have a commitment to resolve the dispute. If a disputant or attorney informs the mediator that he or she has no intentions to settle the case, it immediately puts the mediation in jeopardy. However, mediators must inquire beyond the mere assertions of a disputant that he or she has no interest in settlement. Often, disputants and attorneys are frustrated with their prior efforts to settle the matter,<sup>18</sup> or the disputant may be overconfident in his or her likelihood of success in litigation if the matter does not reach settlement.<sup>19</sup> The disputant may feel obligated to inform the mediator that if he or she could not reach settlement before, there is no chance a settlement will be reached now. The mediator must determine whether the disputant truly has no commitment to resolve the dispute, or whether the disputant is merely frustrated or puffing about the case.<sup>20</sup>

A mediator should explore the disputants' commitment to resolve the dispute from the outset to determine whether mediation is appropriate. That is, due to mediation's voluntary nature, the mediator should inquire into whether the disputants feel forced, coerced, or misled to the mediation table.<sup>21</sup> If so, the mediator can attempt to dispel those feelings and establish a commitment from the disputants to put forth a good faith effort to settle the matter. If a disputant or attorney still cannot commit to mediation, the mediator should consider deferring mediation until a later stage in the proceedings or sending the disputants to another alternative dispute resolution process.<sup>22</sup>

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18. GOLANN, *supra* note 4, § 5.1.1, at 124.

19. *See* Korobkin, *supra* note 5, at 288-94 (discussing how optimistic overconfidence can be a barrier to successful mediation).

20. In the authors' experience, most disputants have a commitment to settling the dispute, which is why they agreed to participate in mediation in the first place. The problem disputants have with settlement is the *terms* of the agreement. It is extraordinarily rare that the disputants will receive each and every term of settlement for which they asked. If they did, the disputants would not be in mediation—the case would have already settled. By its very nature, mediation is a compromise. When the authors say “commitment to settle the dispute,” they mean the disputants' willingness to search for and accept innovative solutions to pre-existing disputes, in which one or both parties may not receive everything the party bargained for, but the agreement is mutually acceptable to all parties to the dispute.

21. *See* discussion *infra* Part II.C (regarding court-ordered mediation, along with the problems associated with it).

22. GOLANN, *supra* note 4, § 5.1.1, at 125.

### C. COURT-ORDERED MEDIATIONS

Court-ordered mediations are different in nature than traditional mediations.<sup>23</sup> Some states, Minnesota for example, require nearly all disputants in civil cases to participate in alternative dispute resolution (ADR) processes.<sup>24</sup> Instead of voluntarily deciding on the appropriateness of mediation or some other ADR process, parties are coerced or ordered to attend, which can drastically reduce the disputants' commitment to the process.<sup>25</sup> In some cases, the disputants "are present not because they want to settle but because they are afraid of being sanctioned if they fail to appear."<sup>26</sup> As such, disputants in court-ordered mediations may be reluctant to participate, but nonetheless will be present at the mediation.

This is an essentially identical problem as the one expressed in subsection B concerning the disputants' commitment to resolving the dispute. Just as discussed above, a mediator should explore the disputants' commitment and intentions regarding settlement early in the mediation process. In doing so, the mediator should work to dispel any feelings of coercion and obtain a commitment to put forth a good faith effort toward settlement. Even if the disputants are loathe to participate, the mediator should push for at least one mediation session to comply with the court's order "in the hope that the dynamic of mediation will convert the 'unhappy campers' in the group."<sup>27</sup> If the disputants are still recalcitrant, however, the mediator has done all that he or she is able. In ending an unproductive court-ordered mediation session, the mediator should stress to the disputants that they have an option to return to mediation if their opinions about the process change, and the mediator should report back to the court as required by the order, statute, or rule.

### D. FAILURE TO PROPERLY PREPARE FOR MEDIATION

The failure to properly prepare for mediation is a pitfall that seems very basic that it requires no elaboration. However, lack of preparation before a mediation is a significant and recurring problem. On occasion, disputants will fail to bring key documents with them or attorneys complain that they have not had a chance to prepare because the mediation is scheduled too

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23. *Id.* § 5.1.4(a), at 137.

24. *See, e.g.*, MINN. GEN. R. PRAC. 114.01 (requiring alternative dispute resolution processes in all civil cases except those enumerated in MINN. STAT. § 484.76 and MINN. GEN. R. PRAC. 111.01, 310.01).

25. GOLANN, *supra* note 4, § 5.1.4(a), at 137.

26. *Id.*

27. *Id.*

early in the matter. Regardless of the excuse, the failure to prepare for the mediation will most certainly result in slowing the mediation process to a crawl, if not a halt. Furthermore, valuable time is wasted. To avoid this, everyone involved in a mediation should prepare thoroughly so they may actively contribute to the process.

In essence, the disputants and the attorneys should prepare for the mediation as if it were on the eve of trial. Thorough preparation sends a message to the other disputants and the mediator that the dispute is grounded in fact and law, that the injury or the defense is real, and that the disputant is taking the mediation process seriously. Disputants and attorneys should bring with them all of the documents and information necessary to prove their case. Also, everyone involved should have recently reviewed the file before beginning the mediation. Likewise, the disputants should clearly express their respective positions and interests to the mediator and to each other. When everyone is prepared, the mediation process moves as it should, and everyone should have all of the information needed to make informed decisions.

#### E. INCOMPLETE MEDIATION STATEMENTS

The disputants' mediation statements, positions, and interests must be fully developed, complete, and disclosed to the mediator. These mediation statements should be disclosed far enough in advance for the mediator to read them, conduct research if necessary, and prepare for the mediation. Without clearly defined statements of the disputants' positions and interests, the mediator may spend valuable mediation time attempting to clarify the disputants' positions, interests, strengths, and weaknesses. Additionally, the failure to provide a developed mediation statement sends a message to the mediator that the disputant or the attorney is not adequately prepared.

Disputants should always carefully review the attorney's mediation statement prior to the mediation. If necessary, the disputant or attorney should supplement or clarify the mediation statement in a timely manner to give the mediator information that he or she needs to facilitate the mediation. Alternatively, the disputant or the attorney may ask for a private caucus to discuss the disputant's positions and interests. This practice, however, wastes time that the disputants should be spending on mediating the merits of the dispute. In sum, if the mediation statement does not contain vital information that clearly emphasizes the disputants' positions and interests, the statement will not assist in the process and the mediator will need to expend time, energy, and effort into exploring the disputants' positions. In turn, the costs involved in mediating the dispute can



dramatically increase. To make everyone's life easier, the mediation statements, positions, and interests must be complete and timely disclosed to the mediator.

#### F. ANTICIPATION AND DISCUSSION OF IMPASSE

The mediator, attorneys, and disputants should consider and anticipate the possibility of impasse before it occurs and discuss how it should be handled if it arises. The failure to anticipate and prepare for impasse may pose problems later in a mediation when the disputants are feeling stuck. For instance, some mediators include an impasse clause in their agreement to mediate or retainer agreement, which provides the mediator with contractual powers over the process in the event an impasse occurs.<sup>28</sup>

Addressing impasse before it occurs can be beneficial in a number of ways. First, once there is an impasse, it is common for disputants to entrench themselves in their positions on all issues. In other words, disputants may simply dig their heels in and say, "I'm not agreeing to anything. This is the way it should be, and I'm not going to accept anything different." At that point, even addressing the impasse or other non-contentious issues becomes difficult. Second, discussing rules to address impasse at the beginning of the mediation provides each disputant with a set of expectations, which often calms disputants who are unsure about the process. Third, discussing impasse before it occurs helps to dispel any appearance of bias when and if the disputants reach an impasse. That is, if the procedure is established at the beginning of the mediation, disputants are more likely to respect the mediation process than if the mediator creates or expresses rules concerning impasse after it occurs. The disputants are not left with the impression that the mediator is favoring one disputant over another. Finally, impasse is important to discuss from the outset due to its significant consequences on the litigation. What, for instance, happens to all of the progress that the disputants made prior to the impasse? Have the parties reached an agreement with respect to those issues, or are they back to square one? Considering the ease of addressing impasse before it occurs and the difficulties and consequences of not doing so, mediators, attorneys, and parties should anticipate the possibility of impasse and address it early in the process.

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28. See, e.g., Colloquium, *More Tips for When Mediation Impasse Strikes*. Also: *Ethical Dilemmas at the Negotiating Table*, 23 ALTERNATIVES TO HIGH COST LITIG. 179, 182 (Dec. 2005) (noting that at least one mediator on the discussion panel regularly includes contractual measures to address mediation impasse in his retainer agreement).

### G. SUBSEQUENTLY SCHEDULED SETTLEMENT CONFERENCES

Another process-related problem that may lead to a mediation failure is a subsequently scheduled settlement conference. That is, the disputants are aware that if the matter does not settle, they will have another opportunity to negotiate and possibly settle the matter later in the proceedings. If a subsequent settlement conference is scheduled, the disputants usually do not have a sense of urgency or importance with respect to settlement at the mediation. Instead, the parties may approach the instant mediation as mere preliminary negotiations that will lead to an ultimate settlement opportunity at the next settlement conference.

Disputants and attorneys can avoid this pitfall by properly evaluating their case before the mediation and by clearly expressing their positions and interests. If the case is properly evaluated, the disputants may take a hard-line approach: because the case is properly evaluated, the offer at the subsequent conference will not be different than the offer presented at the instant mediation. Mediators can help facilitate this communication by inquiring and testing the disputants' offers, which helps the disputants to determine whether their case evaluations are accurate. If the case evaluations are reasonable, the mediator should make an effort to obtain good faith commitments from the disputants and their attorneys to settle the matter as soon as possible.

### H. PREMATURE MEDIATION

Timing of the mediation is critical to its success. If a disputant or an attorney does not have sufficient information to proceed, the mediation may be slowed or stalled. If mediation is scheduled too early or when key events have not yet occurred, the disputants might say, "It's too early to settle; I don't know my case well enough."<sup>29</sup> On the other hand, if the case is too far advanced in litigation, the disputants might have too much invested in the adversarial nature of the case or have too many resources invested in the outcome of the litigation.

The timing issue is most commonly raised "too early," whereas one or more disputants may lack the information needed to accurately value the case and assess the risks involved in the litigation. For example, a mediation is likely to be unsuccessful if an independent medical examination, a medical records review, or certain key depositions have not been completed, or the court has not decided a dispositive summary judgment motion. Without this critical information, the disputant lacks the ability to

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29. GOLANN, *supra* note 4, § 8.1, at 218.

consider his or her best alternative to a negotiated agreement, worst alternative to a negotiated agreement, and most likely alternative to a negotiated agreement.<sup>30</sup>

While ensuring that the disputants have enough information to make an informed decision about the case is essential to a fair and reasonable settlement, too much discovery can result in “entrenchment of positions . . . , thus increasing the likelihood of an impasse.”<sup>31</sup> The disputants should have an opportunity to obtain information necessary to make an informed settlement decision, but it should be done far in advance of the mediation. A mediator should encourage the disputants to obtain vital information early and in an informal manner. A mediator may encourage appropriate information-sharing amongst the disputants by discussing a method of informal exchange of relevant information—including both legally relevant material and material concerning relevant non-legal materials—prior to the mediation.<sup>32</sup>

#### I. PREVIOUS OFFER EXCEEDS REPRESENTATIVE’S AUTHORITY

While it does not occur often, a previous offer by a disputant’s representative that exceeds the authority given to the disputant’s attorney at the mediation may immediately halt a mediation. For example, if a claims adjuster has previously discussed the case with the claimant and has made an offer that exceeds the disputant’s attorney at the mediation, the other disputants will immediately balk and may be insulted by the attorney’s offer.

Disputants should make sure that all information in the file and the status of settlement negotiations are properly communicated to the attorney that is handling the case. All conversations between any representative of the disputant and the other parties regarding the case’s value, and any other matter relevant to the dispute, should therefore be communicated to the person responsible for negotiating at the mediation. While the mediator has little control over the communication between a disputant and his or her representatives, a mediator should inquire into the status of settlement negotiations prior to the start of the mediation, and the disputants should include this information in their mediation statement.

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30. See Henderson, *supra* note 7, at 121 (discussing pre-mediation discovery issues).

31. Paul R. Fisher, *Mediation Advocacy: Axioms for Avoiding an Impasse*, 19 ALTERNATIVES TO HIGH COST LITIG. 135, 149 (May 2001). “Extensive discovery may translate into more headaches and burdens in the mediation of disputes.” *Id.*

32. GOLANN, *supra* note 4, § 8.1, at 218-20.

#### J. CLAIMANT INCREASES DEMAND AT MEDIATION

Disputants should not increase their demands when sitting at the mediation table. Any attempt to do so will most likely be taken as a sign of bad faith by the other disputants, which may result in reluctance to engage in any constructive negotiations.

Despite the general rule, there are a few situations in which a claimant might increase a demand at the mediation. Settlement discussions may have begun when the disputants were unrepresented and they did not consider all of the possible damages. After attorneys are retained, the demand may be increased to include a more thorough damage claim. Other situations that may have an effect on opening offers include situations in which experts have recently proffered opinions concerning the case's value. In other situations, the claimant may increase the demand solely as a positional bargaining tactic. In any event, increasing the demand at mediation should be avoided when possible.

If the claimant increases the demand at the beginning of mediation, the other disputants should express their displeasure with the new demand. In response to this situation, the mediator should inquire into the basis of the new demand and assist the disputants in exploring its validity. The other disputants, however, need not adjust their case evaluation so long as there is a proper basis for it. If the new demand is valid and factually justified, the mediator should move forward with the mediation to the extent possible and attempt to dispel any accusations of bad faith.

#### K. CONTRIBUTION AMONG DEFENDANTS

In situations where there are multiple defendants to a dispute, the defendants should have some agreement with respect to contribution between themselves. While the agreement need not be so specific that all defendants agree to their respective fault, the defendants should be able to reach some agreement concerning contribution percentages for settlement purposes. If the defendants cannot reach an agreement prior to the mediation, there is a significant risk that one disputant will settle individually, which may make settling the case with the other disputants much more difficult.

To facilitate a contribution agreement, the mediator should meet with all defendants, their attorneys, and decision-makers to attempt to work out a contribution agreement for settlement purposes. If the disputants cannot agree, the mediator can suggest alternative processes to avoid the contribution issue. For instance, the mediator could suggest an agreement to settle the matter on an equal contribution basis for the purposes of settling with

the claimant, with the opportunity to have those contribution percentages modified in arbitration at a later time. This arrangement allows the disputants to operate on a level playing field for purposes of the mediation at hand and increase the likelihood of mediation success.

#### L. SUBROGATION INTERESTS

In situations where there are potential subrogation interests, as the situation often is when a third party or insurance carrier is involved, the plaintiff and third party or insurance carrier should come to some agreement with respect to any subrogation interest. Working out insurance coverage and applicable insurance policy dates can be time consuming and will unnecessarily complicate the mediation process. Consequently, wasting time during the mediation on subrogation can slow the process to a halt and jeopardize the likelihood that the dispute will reach settlement.

The plaintiff and any third party or insurance carrier with a potential subrogation interest should work out the subrogation issues before the mediation. Just as in the situation described above concerning contribution issues, the mediator can help facilitate a discussion about any potential subrogation issues by asking the plaintiff about subrogation and the opportunity for a pre-mediation agreement concerning subrogation before the mediation.

#### M. INSUFFICIENT SETTLEMENT AUTHORITY

Insufficient settlement authority is one of the largest obstacles to a successful mediation. When a disputant or attorney does not have the authority to close a deal or settle the matter, the mediation grinds to a halt. The attorney or disputant representative is usually given an opportunity to consult with the ultimate decision-maker, but this sort of consultation is inherently difficult during the mediation process.

To prevent the insufficient settlement authority issue from arising, the mediator should inquire into who has the ultimate settlement authority before the mediation.<sup>33</sup> After determining who possesses the ultimate

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33. Determining who has the ultimate settlement authority may be difficult in certain situations, especially in situations involving a business entity. For instance, the negotiating representative may have to consult with a Board of Directors, or some other governing board before obtaining the authority to settle. In that situation, mediators should suggest that the disputant's representative obtain preauthorization to settle in a particular range prior to the mediation. There also may be third parties who have an interest in the matter, such as a spouse, friend, or relative with whom the disputant would like to consult before reaching settlement. This third party may have no actual settlement authority, but the disputant will not settle without the person's input. These third parties should be treated the same as those with actual authority. Mediators and disputants should make every effort to have those third persons actually present in the mediation

settlement authority, the mediator and the disputants should make every effort to ensure that the ultimate decision-maker is physically present in the mediation room. If the ultimate decision-maker cannot be physically present, the mediator should suggest that the disputant's representative obtain a preauthorization to settle, preferably between zero and the claimant's last demand. Of course, the disputant's negotiator would then have the opportunity to settle at the best negotiated position within that range of possibilities. Regardless of whether the ultimate decision-maker is physically present in the room or the negotiator obtains preauthorization, the settlement authority issue should be addressed as soon as it arises; preferably before mediation begins.

#### N. PERSONS WITH AUTHORITY TO SETTLE DO NOT ATTEND MEDIATION

Every effort should be made by the disputants, attorneys, and the mediator to identify every person who should be physically present at the mediation. The physical presence of the ultimate decision-maker is incredibly important to the likelihood of mediation success because the ultimate decision-maker has access to all of the relevant facts and circumstances presented during the course of a mediation. Those facts and circumstances are not usually conveyed easily over the telephone.<sup>34</sup> For instance, the ultimate decision-maker may have the opportunity to evaluate the claimant's credibility and demeanor, the skill and preparation of the opposing attorney, and the likelihood and costs of success in litigation.<sup>35</sup> Also, if the ultimate decision-maker is physically present, the mediator can impress upon the ultimate decision-maker the significant risks and the potential consequences of the failure to reach a negotiated agreement, including the potential costs of traditional litigation. Settlement is much more attainable if the ultimate decision-maker can evaluate his or her options and risk position based upon all of the relevant information presented at the mediation.

To avoid a potential pitfall, the mediator should always discuss the ultimate authority issue with the disputants to identify the persons who should be present before the mediation. The mediator should also request that the ultimate decision-maker attend the mediation, and the disputants should make every effort to assist the mediator in doing so. If the ultimate

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room. *See generally* Fisher, *supra* note 31, at 148 (indicating the necessity of the presence of third parties).

34. *See id.* (discussing the desirability of having the ultimate decision-maker physically present at the mediation).

35. *See id.*

decision-maker cannot be physically present, the mediator should inquire into the possibility of preauthorization to settle, as discussed in the previous section.

#### O. FAILURE TO PROPERLY DOCUMENT THE MEDIATION SETTLEMENT

The mediator, disputants, and the attorneys should always properly document a mediated settlement before leaving the mediation room. This last concern is intended to avoid “buyer’s remorse,” or in this case, “negotiator’s remorse.” After a long day of mediation, hammering out a mediation settlement might be the last thing the disputants, attorneys, and mediator want to do. Nevertheless, it is one of the most important steps to a mediation. “Parties may, and often do, change their minds the next day, or in the weeks that it sometimes takes for counsel to draft and renegotiate terms.”<sup>36</sup>

To avoid this problem, a settlement agreement should always be in writing and signed by the disputants to avoid issues with enforcing the agreement.<sup>37</sup> Before the mediation, the disputants should prepare a set of proposed settlement agreement clauses to bring to the mediation. The disputants should bring their proposed clauses in a commonly used electronic form<sup>38</sup> so that they may be easily amended to conform to the actual terms agreed upon at the mediation. A mediator might also consider creating form agreements with standardized contract clauses that are common to that mediator’s practice. If the disputants and the mediator modify standardized clauses, drafting a settlement agreement may be done easily and quickly, and everyone will leave the mediation room with a clear understanding of the terms of the settlement.

#### IV. CONCLUSION

Mediation success inherently depends upon the disputants’ commitment to the mediation process and the abilities of the mediator and disputant to communicate effectively with each other concerning the dispute. Common, avoidable pitfalls that undermine the likelihood of a successful mediation might be as simple as the timing of mediation in the litigation process, or as complicated as addressing contribution and

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36. *Id.* at 149.

37. Mediation agreements are usually enforced pursuant to the laws of contract. *See, e.g., Heng v. Rotech Med. Corp.*, 2006 ND 176, ¶ 35, 720 N.W.2d 54, 54 (holding that a term in a mediation agreement was binding upon the parties as a matter of contract); *see also* MINN. STAT. § 572.35.1 (2000) (providing that a mediated settlement agreement is governed by applicable contract law).

38. For example, Microsoft Word or Corel WordPerfect.

subrogation interests involving multiple parties and insurers. Nevertheless, in focusing on two key issues—the disputants' commitment to the process and effective communication between the parties—a mediator can provide the disputants with the best opportunity to reach a negotiated settlement agreement.

The authors hope that by implementing some or all of these practices and by considering the common causes of mediation failure discussed in this article, mediators, attorneys, and disputants will have the additional tools necessary to provide them with the best opportunity for a successful mediation.