Mediation
The Roles of Advocate and Neutral

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CHAPTER 5

An Overview of Mediation

A. Introduction

1. The Process of Mediation

a. What Is Mediation?

Mediation is a process of assisted negotiation in which a neutral person helps people reach agreement. The process varies depending on the style of the mediator and the wishes of the participants. Mediation differs from direct negotiation in that it involves the participation of an impartial third party. The process also differs from adjudication in that it is consensual, informal, and usually private: The participants need not reach agreement, and the mediator has no power to impose an outcome.

In some contexts you may find that this definition does not fully apply. The process is sometimes not voluntary, as when a judge requires litigants to participate in mediation as a precondition to gaining access to a courtroom. In addition, mediators are not always entirely neutral; a corporate lawyer, for instance, can apply mediative techniques to help colleagues resolve an internal dispute, despite the fact that he is in favor of a particular outcome. Occasionally mediation is required to be open to the public, as when a controversy involves governmental entities subject to "open meeting" laws. And finally, a mediator's goal is not always to settle a specific legal dispute; the neutral may focus instead on helping disputants to improve their relationship.

There is an ongoing debate within the field about what "mediation" should be. To some degree, this results from the different goals that participants have for the process: Some focus only on settlement and seek to obtain the best possible monetary terms. Others seek to solve a problem or repair a relationship. Still other participants use mediation to change people's attitudes. The increasing application of mediation to areas such as family and criminal law also raises serious questions of policy. This text focuses on "civil" mediation, involving legal disputes outside the area of collective bargaining, since this is what you are most likely to encounter in law practice. However, to give you a sense of what mediation may become, we also present other perspectives on the process.

b. What Do Mediators Do?

Mediators apply a wide variety of techniques. Depending on the situation, a settlement-oriented mediator may use one or more of the following approaches, among others:

- Help litigants design a process that ensures the presence of key participants and focuses their attention on finding a constructive solution to a dispute.
- Allow the principals and their attorneys to present legal arguments, raise underlying concerns, and express their feelings directly to their opponents, as well as hear the other side's perspectives firsthand.
- Help the participants to focus on their interests and identify imaginative settlement options.
- Moderate negotiations, coaching bargainers in effective techniques, translating communications, and reframing the disputants' positions and perceptions in constructive ways.
- Assist each side to assess the likely outcome if the case is litigated, and to consider the full costs of continuing the conflict.
- Work with the disputants to draft a durable agreement and, if necessary, to implement it.

c. What Is the Structure of Mediation?

Because mediation is informal, lawyers and clients have a great deal of freedom to modify the process to meet their needs. In practice, good neutrals and advocates vary their approach significantly to respond to the circumstances of particular cases. That said, a typical mediation of a legal dispute is likely to proceed through a series of stages.

Premediation

Before the disputants meet to mediate, the neutral often has conversations with the lawyers, and sometimes also with the parties, to deal with issues such as who will attend the mediation and what information the mediator will receive beforehand. Lawyers can use these contacts to start to build a working relationship with the mediator and educate him about their client's perspective on the dispute and obstacles that have made direct negotiations difficult.

The Opening Session

Most mediations begin with a session in which the parties, counsel, and mediator meet together. The content and structure of a joint session can vary considerably, depending on the goals of the process. When mediation is focused on reaching a monetary settlement, the joint session is likely to be dominated by arguments of lawyers, perhaps followed by questions from the neutral. If the goal of the process is to find an interest-based solution or to repair a ruptured relationship, then the mediator is much more likely to encourage the parties themselves to speak and to attempt to draw out underlying issues and emotions.

Private Caucusing and No-Caucus Models

After disputants have exchanged perspectives, arguments, and questions, most commercial mediators adjourn the joint session in order to meet with each side individually in private "caucuses." The purpose of caucusing is to permit disputants, counsel, and the mediator to talk candidly together. Keeping the parties separated, with communications channeled through the mediator, also allows the neutral to shape the disputants' dialogue in productive ways.

When the mediation process is focused on monetary bargaining, the participants usually spend most of their time separated, with the mediator shuttling back and forth between them, and in unusually contentious cases parties may not meet together at all. If, however, parties are interested in exploring an interest-based resolution or repairing a broken relationship, then the mediator is much more likely to encourage them to meet so that they can work through emotions, explore options, and learn to relate productively with each other. Mediators who handle family disputes often prefer to remain in joint session during the entire process, and some mediators are experimenting with no-caucus formats in general civil cases.

Joint Discussions

Even when a mediation is conducted primarily through private caucusing, neutrals sometimes ask the disputants to meet with each other for specific purposes, for instance, to examine the tax issues in a business breakup or to deal with a difficult emotional issue in a tort case. In most mediations, whether or not conducted through caucusing, the lawyers or parties also meet at the end of the process to sign a memorandum of agreement or decide on future steps.

Follow-up Contacts

Increasingly the mediation process is not limited to the specific occasions on which the mediator and disputants meet together. If a dispute is not resolved at a mediation session, then the neutral is likely to follow up with the lawyers or parties. Depending on the situation, the mediator may facilitate telephone or e-mail negotiations, or convene additional face-to-face sessions.

2. *The Value of Mediation*

Although litigants are sometimes compelled to enter mediation, the process can only be successful to the extent that disputants find it effective. What, in the eyes of parties and their lawyers, are the potential benefits of going to mediation? Consider the comments and data that follow.

a. Viewpoints of Lawyers

Diane Gentile, Dayton

My practice is focused on employment law. These claims deal with one of the most important aspects of peoples' identity — their work. In addition, they often involve serious allegations of wrongdoing. Both sides in these disputes often have good reason to want a confidential solution. One example [is] a case I handled involving a worker and supervisor. Several years before[,] the two had had a consensual intimate relationship, but the worker later accused her supervisor of sexual harassment. For the employer, the claim was a potential nightmare. The fact that the supervisor had at first denied the existence of the earlier relationship made it even more difficult. Moreover, because the employer was a nonprofit organization that depended in part on public funds, the potential for negative publicity could have crippled the organization. As soon as we received notice of the plaintiff's suit we suggested mediation. After nine hours of difficult discussions we had a resolution, and the organization's relief was limitless.

Mediation is effective in part because it allows the parties to talk about many things that will never be considered relevant by a court. When they are allowed to speak freely, often in private to a mediator offering a sympathetic ear, material just spills out, and afterward people are often much more willing to compromise. Mediation also allows for nonlegal relief, which is particularly important in employment cases: changes to a file to reflect a voluntary quit rather than termination, for example, or agreement on what the company will say to a future employer asking for a reference.

Mary Alexander, San Francisco, Former President, American Trial Lawyers Association

My practice focuses on personal injury cases, including auto accident, product liability, and defective design claims. Years ago we settled cases only on the courthouse steps, but courts in California now push parties to mediate long before trial. Often a case will not settle at court-ordered mediation, but the process gets lawyers talking and often leads to an agreement.

The single most useful service provided by mediators in my practice is to provide a reality check for clients. People often come into a lawyer's office with very real injuries, but unrealistic expectations about what they can obtain from the court system. They have heard somewhere about a large award and assume that it is typical, when in fact it is not. Clients are often in dire financial straits and physical pain, making it hard for them to listen to a lawyer's warnings about trial risk. When a mediator, especially a former judge, explains the realities of

present-day juries — often in language that turns out to be very similar to what I had said earlier — it makes a real impression. Clients are able to become more realistic, and to accept a good offer when it appears. Even if the courts did not order it, I would elect to mediate almost every significant case.

Stephen Oleskey, Boston

I use mediation extensively in commercial cases to deal with a wide variety of obstacles. My goals depend on the nature of the situation. In one recent case, for example, the problem was anger: The parties had been talking off and on for two years, but both were so upset that they could not focus productively on settlement. At the same time, with several hundred million dollars at stake, neither side could bear the risk of a winner-take-all trial. Mediation created the context for a rational discussion of the merits and risks. In another case, we used mediation to get a group of corporate and political stakeholders to come to the same place and focus intensively on a case that some of them had not previously thought through. Occasionally, I've used a mediator to give a message to a client — or the other side's client — that was hard for a lawyer to deliver. In a few cases, it's been the way that the mediator has framed the discussions: her choice of what issues to focus on, or the statement that, "We'll stay here until midnight if we have to, to get this done," that tells the parties that this is the time to make the difficult choices, put all their money on the table, and work out a deal if possible.

Katherine Gurun, General Counsel, Bechtel Corporation

Our business involves complex construction and engineering projects. It is built around long-term relationships with suppliers and partners. Things inevitably go wrong — equipment fails, customers encounter financial problems, and so on. We have to resolve these issues, but in a way that keeps our relationships healthy. Mediation has become our most powerful and successful process for accomplishing this.

The flexibility of mediation is its most useful quality. In the disputes we encounter, the complex nature of the issues almost always requires several sessions, often spread over a period of months. During adjournments, people can confer with their organizations and the mediator can work on one or both sides. Overall, ADR has reduced our litigation costs phenomenally; just as important, it avoids the management distraction caused by formal litigation.

We also use mediation in international disputes. Here cultural differences are an important consideration. Many of our foreign partners are in mediation for the first time, and it's particularly important to find a neutral who "knows both sides of the fence." Asian executives seem especially comfortable with the mixture of joint and private meetings, because the structure accommodates their preference for conferring and reaching a consensus within the team at each point in the process. Europeans sometimes seem troubled by mediation's lack of formality, but I find that its adaptability is what makes the process so effective.

Paul Bland, Washington, D.C.

There are two major situations in which I find mediation helpful as a litigator for a public interest organization. The first is when we challenge widespread practices; for example, a group of HMOs flagrantly violating a statute. Inside counsel sometimes cannot believe that their organization has violated any law, simply because all of their peers are doing the same thing. In such cases I ask for mediation with a former judge or well-regarded private lawyer — someone who can convincingly tell the other lawyer that her client has a genuine problem.

Another indicator for mediation is when I suspect that defense counsel is not being candid with his own client. Many firms I encounter are completely ethical — they fight hard but fair. Some lawyers, however, seem to "milk" clients, playing on defendants' instinctive belief that they've done nothing wrong and billing them unnecessarily for a year or two. Mediation can be the best way to get the truth to an unrealistic client. I often have to work to get such cases into mediation. I have resorted to coming up to a defense counsel, in the presence of his client, and saying, "This looks like a perfect case for mediation." Or I might write to defense counsel and make an explicit request that he transmit the letter to his client. The hardest part of mediation is sometimes to get the other side into the process.

Patricia Lee Refo, Phoenix, Former Chair, ABA Section of Litigation

My caseload consists primarily of large commercial disputes. We use mediation in most of our cases — I sometimes joke that we lawyers have worked ourselves into a place where we can't settle cases by ourselves anymore! I don't believe that a bad settlement is better than a good trial. I am convinced, though, that in the right situation, a mediator can add a great deal of value. Sometimes the problem is that both sides have the same facts, but they view them very differently. A mediator may not be able to convince a client to change his viewpoint, but she can make the client understand what the other side can do with the facts at trial. It's often the first time the client has heard the reaction of someone who comes to the case completely fresh.

There are also issues in business cases over which people become quite invested and emotional — for example, did someone violate an agreement in bad faith. Mediation allows clients to vent their feelings in private, making it easier for them to compromise later in the process. I recently encountered a mediator who said that he didn't "do venting." I find that aspect of the process often to be crucial, and I won't use neutrals who can't handle it. Mediators can also be helpful by "cutting to the chase," focusing on the few issues that will really matter at trial. This frees parties from arguing over every point, and moves them toward making settlement decisions.

Harry Mazadoorian, Connecticut

I've used mediative methods often in working out business relationships. Insurers, for example, often make investments in joint venture and partnership deals. It's impossible to predict the future, and as the project goes on and circumstances change, issues often arise about how the parties should share

unexpected benefits and responsibilities. I remember one alternative energy venture that nearly broke down when money ran short and additional contributions were required from the participants. At first the lawyers focused on parsing the language of the contract, but as we talked I was able to persuade them to explore options that redistributed costs so that each partner could bear them most easily, and potential benefits in ways that they would be felt most strongly. Once the partners dropped their focus on legalese and looked instead at their specific needs, the conflict was quickly resolved. The greatest music to my ears in these situations was always to hear an executive say, "I just don't know how to get this done." I knew that if I could get the attention of high-level decision makers — ideally, get top people from both sides to sit down at lunch and commit to trying to work it out — success was nearly assured.

b. Business Perspectives

One of the first companies to make aggressive use of mediation was the Toro Corporation, which produces a wide variety of consumer goods, including lawn mowers, snow blowers, and other power tools, and as a result receives personal injury claims. Toro's national mediation counsel describes the results of its program.

❖ Miguel A. Olivella Jr., Toro's Early Intervention Program, After Six Years, Has Saved $50 M

17 Alternatives 81 (1999)

[In 1991 the Toro Corp. implemented] a pre-litigation alternative dispute resolution program that featured nonbinding mediation as its cornerstone.... Most of the claims diverted to the program [at the outset arose] in the products liability or personal injury areas....

How the Program Works

When Toro gets word of a claim against it or one of its many subsidiaries, a paralegal in the Toro legal department is assigned the matter. The legal assistant promptly contacts the claimant's counsel and schedules a meeting to take place as soon as possible at a location convenient to both the claimant and counsel. The purpose of the meeting is to elicit information about the claim and the claimant's expectations. Documentation supporting the claim is requested [usually in the form of medical and wage records]. An in-house Toro engineer typically accompanies the legal assistant to this initial meeting to inspect the product.... Following this meeting, the legal assistant... engages in settlement discussions with the claimant's counsel. If the negotiations don't produce a settlement, the claim is referred to Toro's national mediation counsel, who suggests to claimant's counsel... nonbinding mediation. This offer is almost universally accepted. The mediation is typically scheduled within one month.... Mediations typically last the better part of a day....

The Results

After almost eight years and hundreds of claims, this process has resulted in a 95% settlement rate. [The program has gradually been expanded to include]

commercial matters and breach of contract.... It is virtually impossible to think of any form of litigable claim that the Toro legal department must confront that is not sent to the program.... Comparing data on costs before and after the program was implemented, the total cost of handling a claims file from the time it was opened until the time it was closed decreased from $115,620 to $30,617... a 74% drop. And the average file's lifespan was reduced to three months from two years.... With 636 claims opened and closed between 1992 and 1996... the program translates into an overall savings for Toro exceeding $50 million. ... That doesn't include [savings in more recent years or] the roughly $6 million in insurance savings realized during the first three years of the program. We're just getting warmed up.

Questions and Notes

1. If you were Toro's outside counsel and were consulted when the company was considering whether to implement an ADR program, what concerns might you reasonably have had about its effects? Why do you think these concerns did not materialize?
2. If you were consulted by a client injured by a Toro product, would you advise her to participate in the Toro process? What factors would be important in your decision?
3. One issue that Toro faced was to persuade plaintiff counsel that the invitation to mediate was not merely a pretext for "free discovery" or "below market" settlements. To overcome such suspicions, Toro developed a list of references — plaintiff lawyers who had worked with Toro and could vouch for its sincerity.

In recent years researchers have questioned companies about their use of ADR. The following is a summary of what one survey found.

❖ David B. Lipsky and Ronald L. Seeber, Patterns of ADR Use in Corporate Disputes

54 Disp. Resol. J. 66 (February 1999)

We asked respondents a range of questions designed to gauge the extent of ADR use [by large U.S. corporations.] Nearly all our respondents reported some experience with ADR, with an overwhelming 87% having used mediation and 80% having used arbitration at least once in the past three years.... We conclude that ADR has made substantial inroads into the fabric of American business, with counsel overwhelmingly preferring mediation (63%); arbitration was a distant second (18%).... [N]early all corporations have experience with ADR, but a much smaller number of companies use mediation and arbitration frequently.

Why Do Corporations Use ADR?

One of the more significant forces driving corporations toward ADR is the cost of litigation and the length of time needed to reach a settlement. All

else being equal, ADR is widely considered cheaper and faster.... Cost reduction may be the most widely cited reason for choosing ADR, but corporations report other reasons as well.... We found that many of the answers related to the parties' desire to control their own destinies — to have some control over the path to resolution.... The most often cited reason to use mediation (identified by 82% of the respondents) was that it allows the parties to resolve the dispute themselves....

Eighty-one percent of those surveyed said that mediation provided a more satisfactory process than litigation, 67% said that it provided more satisfactory settlements, and 59% reported that it preserved good relationships. In sum, these responses indicate that mediation provides not just an alternative means to conventional dispute resolution but a superior process for reaching a resolution.... Large corporations that have faced intense competitive pressures... appear more likely to have strong pro-ADR policies. Also, corporations that have adopted cutting-edge management strategies seem likelier to be pro-ADR. By contrast, smaller, more profitable corporations... are more likely to favor litigation. When corporations use mediation frequently or very frequently, the dominant reason they do not use it is because opposing parties won't agree to it....

The Future of ADR

In general, a large majority of the respondents in our survey believe that they are "likely" or "very likely" to use mediation in the future — 38% and 46%, respectively. They were more cautious about the use of arbitration.... If these projections are accurate, the use of ADR by U.S. corporations will grow significantly.

The trends noted in this reading continue. A 2004 survey of corporate general counsel found that the respondents had mixed attitudes toward binding arbitration, but supported the use of mediation. Asked "What is your company's attitude toward nonbinding mediation clauses in its [domestic business] agreements?", the respondents gave these answers:

Strongly Favor	31%
Slightly Favor	29%
Neutral	25%
Slightly Disfavor	8%
Strongly Disfavor	7%

General counsel at large companies were the most likely to support mediation clauses, with 35 percent strongly favoring and only 1 percent strongly disfavoring their use. (For full survey results, see *Corporate Counsel Litigation Trends Survey Results* at *www.fulbright.com.*) We discuss the issues raised by contractual mediation clauses in Chapter 12.

c. Is It Right for Every Dispute?

No one would argue that mediation is appropriate for every controversy. Even those who generally favor its use agree that the process may not be effective in the following situations, among others:

- A disputant is not capable of negotiating effectively. This may occur, for example, because the person lacks legal counsel or is suffering from a personal impairment.
- One side in the controversy feels the need to establish a legal precedent. A party may need a judicial decision to use as a benchmark for settling similar cases.
- A litigant may require a court order to control the conduct of an adversary.
- One of the disputants is benefiting from the existence of the controversy. For example, a party may be using the litigation process to inflict pain on the other, or is maintaining a defense in court to delay making a payment for business reasons.
- A party needs formal discovery to evaluate the strength of its legal case.
- A crucial stakeholder refuses to join the process.

To some commentators, mediation is inherently unjust. They argue that the very informality of the process allows both neutrals and parties to express prejudice that is suppressed by more formal procedures. Mediation, it is argued, also facilitates case-by-case resolutions that siphon off pressure for law reform. Other critics concede that ADR may be useful generally, but sharply object to its application to specific areas, for example in divorce litigation. Some contend, for example, that by suggesting that legal standards are only one point of reference, ADR opens the way to the exploitation of unsophisticated parties. Such criticism is particularly strong in situations where participation in mediation is mandatory, as when parents in a dispute over child custody are required to go through ADR as a precondition to obtaining access to a judge. Other writers have suggested that minorities tend to do less well in certain forms of mediation. Still another issue is whether ADR gives an advantage to "repeat players" such as corporations and insurers. And some studies have called into question a basic premise of court-related mediation programs — that they reduce the duration of cases. All of these critiques raise significant policy issues, which are discussed in more depth in Chapter 13.

3. Examples of Mediation in Action

a. Death of a Student

Note: Confidentiality is one of the most important attributes of mediation. The facts in the following account that have not previously been published have been approved by attorneys for both parties.

In August 1997 Scott Krueger arrived for his freshman year at the Massachusetts Institute of Technology. Five weeks later, he was dead. In an incident that made national headlines, Krueger died of alcohol poisoning following an initiation event at a fraternity. Nearly two years later Krueger's parents sent MIT a demand letter stating their intent to sue. The letter alleged that MIT had caused their son's death by failing to address what they claimed were two long-standing campus problems: a housing arrangement that they said steered new students to seek rooms in fraternities, and what their lawyer called a culture of alcohol abuse at fraternities.

MIT's lawyers saw the case as one that could be won. An appellate court, they believed, would rule that a college is not legally responsible for an adult student's voluntary drinking. Moreover, under state law the university could not be required to pay more than $20,000 to the Kruegers (although that limit did not apply to claims against individual university administrators). MIT officials felt, however, that a narrowly drawn legal response would not be in keeping with its values. They also recognized that there were aspects of the institution's policies and practices — including those covering student use of alcohol — that could have been better. MIT's president, Charles M. Vest, was prepared to accept responsibility for these shortcomings on behalf of the university, and felt a deep personal desire for his institution to reach a resolution with the Krueger family. MIT also recognized that defending the case in court would exact a tremendous emotional toll on all concerned. The Kruegers would be subjected to a hard-hitting assessment of their son's behavior leading up to his death, while MIT would be exposed to equally severe scrutiny of the Institute's culture and the actions of individual administrators. Full-blown litigation in a case of this magnitude was also sure to be expensive, with estimated defense costs well in excess of $1 million.

The question, as MIT saw it, was not whether to seek to engage the Kruegers in settlement discussions, but how. The university decided to forego a traditional legal response and reply instead with a personal letter from President Vest to the Kruegers, which noted the university's belief that it had strong legal defenses to their claims, but offered to mediate.

The Kruegers responded with intense distrust. Tortuous negotiations ensued. The parents eventually agreed to mediate, but only subject to certain conditions: At least one session would have to occur in Buffalo, where the Kruegers lived. MIT would have to offer a sincere apology for its conduct; without that, no sum of money would settle the case. There would be no confidentiality agreement to prevent the parents from talking publicly about the matter, while at the same time any settlement could not be exploited by MIT for public relations purposes. The Kruegers would have the right to select the mediator. And, President Vest would have to appear personally at all the mediation sessions. The university agreed to most of the conditions and the mediation went forward.

MIT's lawyers believed that it was important that the Kruegers' lawyers and the mediator understand the strength of the university's defenses, but plaintiff counsel knew that subjecting the Kruegers to such a presentation would make settlement impossible. To resolve the dilemma, the lawyers bifurcated the process. The first day of the mediation, which the Kruegers would not attend, would focus on presentations by lawyers and would be held in Boston. One week later the mediation would resume at a conference center

located a 40-minute drive outside Buffalo, this time with the Kruegers present. Their counsel selected that location so that "no one could leave easily." On the second day the Kruegers would personally meet President Vest, and the parties would begin to exchange settlement proposals.

Counsel had agreed that the mediator, Jeffrey Stern, should begin the day by having a private breakfast with Mr. and Mrs. Krueger and their lawyers. The Kruegers vented their anger, first to Stern and later to President Vest. "How could you do this?" they shouted at Vest, "You people killed our son!" They also challenged Vest on a point that bothered them terribly: Why, they asked him, had he come to their son's funeral but not sought them out personally to extend his condolences? Vest responded that he had consulted with people about whether or not to approach the Kruegers and was advised that, in light of their anger at the institution, it would be better not to do so. That advice was wrong, he said, and he regretted following it.

Vest went on to apologize for the university's role in what he described as a "terrible, terrible tragedy." "We failed you," he said, and then asked, "What can we do to make it right?" Mrs. Krueger cried out again at Vest, but at that point her husband turned to her and said, "The man apologized. What more is there to say?" Their counsel, Leo Boyle, later said that he felt that, "There's a moment... where the back of the case is broken. You can feel it.... And that was the moment this day." The mediator gradually channeled the discussion toward what the Kruegers wanted and the university could do.

Hard bargaining followed, much of it conducted though shuttle diplomacy by the mediator. In the end the parties reached agreement: MIT paid the Kruegers $4.75 million to settle their claims and contributed an additional $1.25 million to a scholarship fund that the family would administer. Perhaps equally important, President Vest offered the Kruegers a personal, unconditional apology on behalf of MIT that no court could have compelled and that would not have been believed if it were. At the conclusion of the process Vest and Mrs. Krueger hugged each other. For MIT the settlement, although expensive, made sense: It minimized the harm that contested litigation would have caused to the institution. And, most important, the university felt that it was the right thing to do.

What did the mediator contribute to the process? During the first day, Stern questioned both lawyers closely about the legal and factual issues, creating a foundation for realistic assessments of case value later in the process. The initial money offers put forth by each party were far apart, but the mediator put them into context so that neither side gave up in frustration. According to plaintiff counsel Brad Henry, Stern's greatest contribution was probably the way he responded to the Kruegers' feelings: "What he did most masterfully was to allow a lot of the emotion to be directed at him. He allowed it almost to boil over when it was just him with the Kruegers, but later he very deftly let it be redirected at President Vest and the university.... He also prepared Charles Vest for the onslaught.... Mediation can be like a funeral — especially with the death of a child. He mediated the emotional part of the case, and then let the rest unfold on its own."

Questions

4. What barriers appear to have made it difficult for the parties in the Krueger case to negotiate with each other directly?
5. What did the Kruegers obtain in mediation that they could not have won at trial?

b. United States et al. v. Microsoft Corporation

In one of the highest-profile antitrust cases in U.S. history, the Justice Department, later joined by several states, sued the Microsoft Corporation, arguing that it had monopolized certain markets in computer software. While the case was pending, judges twice ordered the parties into mediation processes, which are described in the following readings.

❖ James Laflin and Robert Werth, Unfinished Business: Another Look at the Microsoft Mediation: Lessons for the Civil Litigator

12 Cal. Tort Rep. 88-92 (April 2001)

On November 18, 1999, twelve months into a case that was eventually to last eighteen, U.S. District Judge Thomas Penfield Jackson announced the appointment of Richard A. Posner, the Chief Judge of the Seventh Circuit Court of Appeals in Chicago, to serve as mediator in the Microsoft antitrust case.... Posner was neither a practiced diplomat nor experienced mediator. However, he brought other credentials to the table. He had gained recognition as one of the most capable, influential members of the federal bench, and a recognized authority in the field of antitrust law....

Posner's mission as a mediator was to induce Microsoft and the government to shed what he referred to as "emotionality" and come to a rational compromise. At the outset, the parties met for lunch at a private club, in what would turn out to be the only face-to-face meeting of the entire mediation process. In attendance were lawyers representing Microsoft, the Justice Department and three attorneys general representing the nineteen states who joined as plaintiffs in the suit. In describing the protocol, Posner indicated he would refrain from evaluating the strength of either side's case, "try to deflate unrealistic expectations" and keep all talks in confidence. Each side was asked "to make a detailed presentation of the facts and remedies it would consider." Posner promised to devote himself almost full time to the process.

To mitigate "emotionality" Judge Posner ordered separate meetings for at least the first month, the government each Monday, Microsoft each Tuesday. Two months later the process had evolved into a form of shuttle diplomacy interspersed with the judge's email inquiries seeking additional information. He began, in the words of one Microsoft negotiator, "growling at the other side, growling at us." After two months of work Posner outlined the first draft of a settlement proposal. Over the next several months, some nineteen draft proposals were exchanged via Posner, who edited them into his own language and emailed them either to Microsoft's General Counsel, or the chief of the Justice Department's Antitrust Division. Copies went to the chair of the association of the nineteen state attorneys general.

By mid-February, negotiations had stalled. Neither side believed that the other was open to a compromise, and both sides were often confused. At Microsoft, this was reflected by [General Counsel] Bill Neukum[,] who said of Posner, "You keep asking yourself, 'Is he wearing his hat as a mediator, trying to motivate people to narrow their differences and come together, or is he speaking as the Chief Judge of the Seventh Circuit, who's an expert on antitrust law?'" Compounding this confusion, neither side could be sure whether, or which, terms contained in the successive draft proposals originated with Judge Posner or came directly from their adversary.

From late February 2000 through the end of March, Posner had extensive telephone conversions with Microsoft, sometimes with [Chairman William] Gates directly, and with Justice Department attorneys, in which successive draft agreements were negotiated and refined. In early March Gates seemed close to accepting the deal reflected in draft fourteen, which Posner forwarded to the Justice Department and the states. The states were given ten days to accept, or Posner would terminate the process. The state attorneys general made it clear that Joel Klein [chief of the Justice Department team] was not their spokesperson and responded separately to the proposal. The states were angry with both Posner and Klein. As one state official said, "Posner was more interested in dealing with Gates and Klein and didn't perceive that he had nineteen other parties to the lawsuit.... He got enamored of talking to Gates. And he's not a mediator by training, and lacked basic mediation skills."

Posner was prepared to summon the parties to Chicago for direct face-to-face negotiations starting on March 24th. Their options would be to accept the basic terms contained in the most recent draft, or face termination of the mediation. More emails and telephone conversations between Posner and the two sides ensued. Meanwhile, the states had communicated their disapproval of parts of draft eighteen and added further conditions. Posner now realized he would have to negotiate with the nineteen state attorneys general to develop a single government proposal. Then, even if that could be accomplished, he would still have to negotiate the divide between the government stakeholders and Microsoft. That night he telephoned Microsoft and Klein and announced that his mediation effort was over.

The Microsoft case went to trial and the court found that Microsoft had violated antitrust laws. Judge Jackson ordered a breakup of the company, and Microsoft appealed. Several months later the court of appeals upheld some of the trial court's findings of antitrust violations, rejected others, and disapproved the court's breakup remedy. Criticizing the conduct of the trial judge, particularly his decision to talk privately with a reporter, the appeals court appointed a new judge to preside over the case. Other changes had occurred: While the appeal was pending, a new president had taken office and the Justice Department had announced that it would no longer seek a breakup of the company. Before resuming hearings, the second trial judge again referred the Microsoft case to mediation. The following reading summarizes its results.

❖ Eric Green and Jonathan Marks, How We Mediated the Microsoft Case

The Boston Globe A23 (November 15, 2001)

Mediators never kiss and tell. But within the bounds of appropriate confidentiality, lessons can be learned from the three-week mediation marathon that led to Microsoft's settlements with the Department of Justice and at least nine states. Federal District Judge Colleen Kollar-Kotelly took over the case after the Court of Appeals partially affirmed the prior judge's findings that Microsoft had violated antitrust laws.... Neither the mediation nor the settlements would have happened if Kollar-Kotelly had not acted to suspend litigation and order settlement negotiations. The judge's Sept. 28 mandate was blunt: "The Court expects that the parties will... engage in an all-out effort to settle these cases, meeting seven days a week and around the clock, acting reasonably to reach a fair resolution." The court gave the parties two weeks to negotiate on their own, ordering them to mediation if they couldn't reach agreement by then. The court bounded its "24/7" timetable by ordering the parties to complete mediation by Nov. 2.... Tight timetables command attention. In mediation, just as in negotiation, time used tends to expand to fit time available. A firm deadline gets the parties to focus....

We are both mediators, with 40 years of combined experience.... But we are not experts in the applicable law or the disputed technology.... Even had we had such expertise, our objective would not have been to try to craft our own settlement solution and sell its merits to the parties. We believed that the only chance of getting all or most parties to a settlement was for us to work intensively to help them create their own agreement. Our "job one" was to facilitate and assist in the gestation, birth, and maturing of such an agreement. We had to be advocates for settlement — optimistic and persistent — but not advocates for any particular settlement....

Reaching a settlement required working with adversarial parties with very different views about a large number of technologically and legally complicated issues. When we arrived on the scene, the parties had begun exchanging drafts of possible settlement terms.... After initial separate briefings, we moved the process into an extended series of joint meetings, involving representatives of the Antitrust Division, the state attorneys general and their staffs, and Microsoft. No party was left out of the negotiations. The bargaining table had three sides....

Throughout most of the mediation the 19 states and the federal government worked as a combined "plaintiffs" team. We worked to ensure the right mix of people, at the table and in the background. The critical path primarily ran through managing and focusing across-the-table discussions and drafting by subject matter experts — lawyers and computer mavens — with knowledge of the technological and business complexities gained through working on the case since its inception. The critical path also required working with senior party-representatives who could make principled decisions about priorities and deal breakers.

[As a result of the mediation, Microsoft, the Justice Department, and ten state attorneys general reached agreement.] Even as settlement advocates we have no quarrel with the partial settlement that was achieved.... Successful mediations are ones in which mediators and parties work to identify and

overcome barriers to reaching agreement . . . Successful mediations are ones in which, settle or not, senior representatives of each party have made informed and intelligent decisions. The Microsoft mediation was successful.

Note: The remaining nine attorneys general filed objections to the settlement with the trial judge, but both the trial and appeals courts upheld its terms.

Questions

6. Consider the mediation of the student death case described previously. What goals, other than avoiding litigation costs, did the university seem to have in proposing mediation?
7. What did the student's family appear to be seeking from the process?
8. Neutrals reveal their own definition of mediation by the manner in which they practice it. Looking at the techniques that Judge Posner applied, what appeared to be his concept of how mediation should work?
9. In what ways did mediators Green and Marks view the process differently?
10. Marks and Green emphasize the importance of deadlines. Do you think the judge could have achieved the same settlement result by setting a firm trial date and ordering the parties to negotiate with each other directly?