Successful Strategies in Mediating Employment Cases

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SUCCESSFUL STRATEGIES IN MEDIATING EMPLOYMENT CASES

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Ross W. Wooten‡

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I. INTRODUCTION

Mediation is a "settlement negotiation assisted by a trained, neutral third party."¹ Mediators lack the authority to impose a decision; instead, they help the participants reach their own solution to the dispute.² Twenty years ago, most mediations involved "minor disputes"—disagreements over "relatively small amounts of money or relatively pedestrian issues."³ However, mediation increasingly is being used to resolve disputes that otherwise would travel down the traditional adversarial path.⁴

Mediation existed as a method for resolving disputes even before the creation of formal law.⁵ However, the integration of the traditional adversary system and the mediation process occurred only within the last two decades.⁶ In some parts of the United States, mediation is still in its infancy.⁷ Consequently, this contrib-

1. Ann C. Hodges, Mediation and the Americans with Disabilities Act, 30 GA. L. REV. 431, 432 (1996); see also JAY FOLBERG & ALISON TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION 7 (1984) (defining mediation as "the process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs").
4. See id. at 31.
6. See Cletus C. Hess, To Disclose or Not to Disclose: The Relationship Between Confidentiality in Mediation and the Model Rules of Professional Conduct, 95 DICK. L. REV. 601, 601 (1991) (stating that disputes formerly resolved only through the adversarial process are now submitted to mediation because of rising court costs and increased delays); see also Shelby R. Grubbs, Preparing for Mediation: An Advocate's Checklist, TENN. B.J., Mar.-Apr. 1996, at 14, 14 (predicting that mediation will be the most prominent alternative dispute resolution technique used over the next decade).
7. For an exhaustive survey of the use of mediation in each state, see Peter
utes to the differing views in various regions of the country about what the mediation process entails and the appropriate role of the mediator. Mediation can take many forms, ranging from voluntary nonbinding mediation, where the attorney plays a small role, to mediation-arbitration combinations, where the parties authorize the mediator to render a binding award in the event of impasse.

S. Chantilis, *Mediation U.S.A.*, 26 U. MEM. L. REV. 1031 (1996). Most states either have not yet established state-supported formalized mediation or currently are using some formalized mediation rules, laws, procedures, or pilot programs that were not established until the 1990s. See generally id. A few states, such as Louisiana and Arkansas, have only recently established task forces to evaluate the use of ADR in their courts. See *id.* at 1038, 1057. In 1994, Minnesota passed Rule 114 of the Minnesota General Rules of Practice, which permits trial courts to use mandatory court-annexed ADR as a prerequisite to going to trial. See *id.* at 1061. In the same year, Wisconsin officially adopted a rule that allows courts to order cases to nonbinding ADR. See *id.* at 1081.


9. See Nolan-Haley, *supra* note 8, at 53 n.23 (noting the difficulty in defining mediation because of the new practice models that are emerging).

10. See *H. Warren Knight et al., Alternative Dispute Resolution* ¶ 3:66 (1995) (stating that voluntary mediation is entirely voluntary and the process continues only so long as the parties agree); see also Beth A. Rowe, *Binding Arbitration of Employment Disputes: Opposing Pre-Dispute Agreements,* 27 U. TOL. L. REV. 921, 940 (1996) (stating that the mediator's role in non-binding mediation is to facilitate settlement between the parties).

11. See Knight et al., *supra* note 10, ¶¶ 3:10-12.11. The authors summarize traditional mediation and the most common variations. "Classic" mediation involves the mediator and the parties meeting directly, usually without attorneys, to procure settlement. See *id.* ¶ 3:10. The mediator does not make a judgment in favor of any party. See *id.* A voluntary settlement conference is another type of mediation. See *id.* ¶ 3:11. Attorneys usually represent the parties, and a retired judge or other experienced litigator presides over the conference. See *id.* The mediator may express an opinion but is not authorized to make a binding decision. See *id.* At a mini-trial, the attorneys make their presentations to a panel consisting of decision-makers from each side. See *id.* ¶ 3:12. A neutral mediator is present to control the arguments, but the panel meets privately to negotiate a settlement. See *id.* In mediation-arbitration, the process begins with traditional mediation, but the parties agree to go to arbitration in front of the same person acting as the mediator if a settlement cannot be reached in mediation. See *id.* ¶ 3:12.10. Arbitration-mediation, or "last chance" mediation, entails arbitration in which the arbitrator prepares a written award but does not disclose it to the parties. See *id.* ¶ 3:12.11. The arbitrator then conducts a mediation in a final attempt
While most attorneys may be accustomed to traditional mediation—where the parties begin the process together, then divide into separate caucus rooms with the mediator engaged in "shuttle diplomacy,"12—this format may be altered in numerous ways.13 Thus, the word mediation may mean different things to different people. This is particularly true when the opposing parties are not from the same city. Consequently, it is important to ensure that both sides have the same understanding of how their particular mediation will proceed.14

Given the growing number of employment-related lawsuits15 and the increase in the use of mediation,16 mediation is sure to play an important role in resolving these disputes. This Article outlines mediation strategies in employment disputes from a plaintiff's perspective; however, most of the suggestions are equally helpful to a defendant's attorney. Part II discusses important issues to consider before the parties go to mediation, including why parties should mediate, the right time to mediate, and how to select a mediator. Part III discusses the mediation process itself, from who should attend the session to how to reach a settlement. Part IV concludes by briefly discussing some alternatives to mediation.

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12. For an excellent description of this process, see Robert B. Fitzpatrick, Non-Binding Mediation of Employment Disputes: An ADR Method That is Consistent with the American Promise of Fairness, in ADVANCED EMPLOYMENT LAW AND LITIGATION 111, 116-17 (1994). The shuttle diplomacy phase of mediation commences after the initial face-to-face meeting where the parties present brief summaries of their case. See id. at 116. At this point, the mediator has one side adjourn to a separate room and the caucus or shuttle diplomacy begins. See id. at 117. Since these sessions are private, the mediator and the parties usually feel more free to ask questions and disclose relevant information. See id. The mediator will go back and forth probing the parties, sometimes for many hours. See id. The parties may not see each other until a resolution is reached and, if need be, put in writing. See id.

13. See Calkins, supra note 5, at 310 (noting several ways to conduct mediation, including keeping the parties together throughout the entire process or using private caucuses extensively).

14. See KNIGHT ET AL., supra note 10, ¶ 3:26 ("[M]ediation is a consensual process and can be structured in whatever manner the parties agree upon."); see also Calkins, supra note 5, at 308 (noting that if a law firm has a number of cases to mediate, it typically schedules several of them on a single day or a block of days).

15. See Jay Stuller & Matthew Budman, "You'll Be Hearing From My Lawyer": Wrongful Termination Lawsuits, ACROSS BOARD, Jan. 1997, at 32, 32 (reporting that according to the Bureau of National Affairs, over 25,000 wrongful discharge cases were pending in 1994, and the number is increasing).

16. See Hess, supra note 6, at 601.
II. PRE-MEDIATION STRATEGIES

A. Why Mediate

Most plaintiffs' attorneys consider settlement from day one of their representation of a client. The traditional method of settlement – offer and counteroffer – frequently does not work in employment cases, particularly early on in the case. A demand letter by the plaintiff's counsel is, more often than not, responded to with a letter that not only refuses to make a counteroffer, but that also contains words like "frivolous," "without merit," and "sanctions." Moreover, in many employment cases, feelings are so strong that the parties will not even consider settlement.

Mediation is an excellent way to get the parties communicating because the mediator can help the parties overcome the intense emotions that often accompany these disputes. Employees may feel hurt and betrayed, particularly if they have been terminated. Employees may also want to feel vindicated and have their "day in court." Likewise, employers may have similar feelings as a

17. See Kenneth P. Nolan, Settlement Negotiations, LITIGATION, Summer 1985, at 17, 17. Nolan lists several important reasons for plaintiffs' attorneys to attempt to settle early. First, plaintiffs' lawyers should not forget that their primary objective is to get money to compensate the client for the injury. See id. Second, an award today may be worth more than a greater amount three years from now. See id. The time and energy saved may be worth even more. Third, the plaintiff will be relieved of the stress and pressure of litigation. See id. Finally, settlement also eliminates the risk that an unpredictable event will determine the outcome of the case. See id.

18. See Chrys A. Martin, Special Considerations in Sexual Harassment Claims, FED. LAW., July 1996, at 35, 36 (noting that many factors, including the employee's and the employer's emotional levels and their financial situations, interfere with the process of settling employment-related disputes).

19. See id. at 36 (observing that an employer usually is convinced it did nothing wrong and views settlement as an admission of guilt).

20. See id. In sexual harassment disputes, for example, the harassed employee typically has strong feelings of "hurt, anger, and indignation, as well as concern about vindication." Id. The employer, especially where a high-level executive is the accused harasser, may avoid any attempts to settle the case. See id.

21. See Mediation: A "Cathartic" Pressure Valve for Employment Disputes, IOWA EMPLOYMENT L. LETTER, Dec. 1996 (noting that a good mediator will absorb the strong emotional feelings so disputes can be resolved in a peaceful manner).

22. See Matthew Budman, Staying Out of the Courtroom, ACROSS BOARD, Jan. 1997, at 30 (likening an employment dispute to a matrimonial dispute where it is best for the couple (the litigants) to attend counseling (mediation) rather than face divorce (litigation)); Mediation: A "Cathartic" Pressure Valve, supra note 21.

23. See Budman, supra note 22, at 30; Martin, supra note 18, at 36.
result of being sued by a current or former employee.24 Convinced that they are not at fault, employers typically view settlement as an implicit admission of wrongdoing.25 In addition, the employer may want to fight a lawsuit to discourage similar allegations.26 In spite of this, a good mediator can help the parties communicate and work toward a settlement.27 In short, mediation can be an excellent way for parties in employment disputes to settle their case.

B. When to Mediate

Litigation is not a prerequisite to mediation. A case or claim can be mediated before a lawsuit is filed, after a lawsuit is filed, after discovery is completed, on the eve of trial, following a jury verdict, after oral argument on appeal, or at any other time the parties agree to submit the dispute to mediation.28 In fact, the parties may be directed to attend mediation by the court.29 Once both sides have agreed to mediation, they must determine when, where, and how the mediation will occur. In most cases, the sooner mediation takes place, the sooner the case is likely to settle.30

A plaintiff's attorney may suggest mediation even when the employer has refused to make a counteroffer to the plaintiff's first settlement offer.31 The lawyer may do this with a case that is worth

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24. See Martin, supra note 18, at 36.
25. See id.
26. See id.
27. See FOLBERG & TAYLOR, supra note 1, at 55. The mediator's task at the negotiation and decision-making stage is to reframe the issues to ask the question: "Which option will best meet everyone's needs?" Id. Mediators should move the participants from competitive negotiation to cooperative problem-solving while encouraging interaction between them. See id.; see also Dominic Bencivenga, Mediation Boutique: Firm Provides Neutrals to Settle Job Disputes, N.Y. L.J., Dec. 26, 1996, at 5 (noting that the flexibility of mediation allows for creative solutions in employment situations, where emotions can run high).
28. See KNIGHT ET AL., supra note 10, ¶ 3:16. In fact, one of the benefits of mediation is that parties usually feel that it presents the last chance to settle their dispute before going to trial and, thus, will give their best efforts to resolve the situation. See Calkins, supra note 5, at 280-81 (noting that the mediation process has a separate life outside of the lawsuit).
29. See Nolan-Haley, supra note 8, at 48-49 (observing that within the last 15 years, state and federal court judges often have required litigants to attend mediation before trial).
30. See ERIC GALTON, REPRESENTING CLIENTS IN MEDIATION § 2.3, at 6 (Diane Burch Beckham ed., 1994) (stating that as the lawsuit progresses, the parties' positions harden and compromise becomes more difficult).
31. See Barbara Ashley Phillips, The Mediation Process, in THE ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE §§ 26, 26.5, at 6-7 (Bette J. Roth et al. eds.,
a small amount or that will be very difficult to prove. The advantage of this approach is that if you can get the opposing party to the mediation table, a good mediator has a chance of persuading the employer to pay some amount of money to settle the case. The big hurdle – convincing the employer to mediate — may lessen as employers seek to avoid time-consuming jury trials and unpredictable awards of punitive damages.

Another factor to consider in determining when to mediate is whether enough information is available to value the case — both in terms of liability and damages. Moreover, the plaintiff’s counsel must be fully informed of the client’s expectations, meaning the attorney has a complete picture of what the client would accept to settle the case. Of course, one of the advantages of mediation is that if the client has unrealistic expectations, the mediator can help bring the negotiations into a reasonable range. Clients are less likely to become angry if the reality check comes from the neutral mediator rather than from their attorney.

32. See Fitzpatrick, supra note 12, at 115 (stating that the first, most arduous step is getting both sides to agree to mediation); Hodges, supra note 1, at 458 n.167 (discussing an Equal Employment Opportunity Commission pilot project in which 87% of the charging parties agreed to mediate, but only 43% of the respondents agreed).

33. See Bencivenga, supra note 27, at 5.

34. See Fitzpatrick, supra note 12, at 115 (stating that mediation is appropriate once you believe the other party is truly interested in mediation and you have the information essential to evaluate your case); Bencivenga, supra note 27, at 5; Walter G. Gans & David Stryker, ADR: The Siemens’ Experience, Disp. Resol. J., April 1996, at 40, 40 (stating that the “true value of any dispute resolution technique” can be examined only through analyzing how it is used — whether the party’s needs are met; whether the process is more efficient and less expensive than litigation; and whether goodwill, human and economic resources, and business relationships are sustained); Jan Norman, Finding a Middle Ground: More People Turning to Mediation to Solve Problems, Save Money, Austin Am.-Statesman, July 27, 1996, at 5 (reporting that the best time for mediation is when both parties have enough information to be realistic in their demands); see also Calkins, supra note 5, at 307 (noting that in the area of insurance, “the best candidates for mediation are those files where liability is clear and only the question of damages is in dispute”); Rowe, supra note 10, at 936-37 (noting that employees should be careful when attempting to arbitrate because they may have signed a pre-dispute arbitration agreement that limits or eliminates discovery, thereby impairing the use of potentially incriminating evidence against the employer).

35. See Calkins, supra note 5, at 297 (discussing the importance of patient mediators who can “slowly and deliberately” bring down the unrealistic expectations of a party); Martin, supra note 18, at 36 (noting that a few recent large jury verdicts in favor of plaintiffs have both plaintiffs and their counsel incorrectly viewing the harassment case as “a pot of gold at the end of the rainbow”).

36. See NANCY H. ROGERS & CRAIG A. MCEWEN, MEDIATION: LAW, POLICY,
Typically, a case with few witnesses, such as one involving sexual harassment, is better suited for early mediation than a more factually intensive case, like an age discrimination case with poor performance issues and many potential witnesses. A case with complicated issues makes it very difficult for the parties to reach an early agreement. The mediator's job then becomes more difficult because more issues need to be worked through before the parties can reach a final settlement. Also, more complicated cases may be difficult to mediate early in the process because of the greater need for discovery.

Although the parties may be better served if the dispute is mediated early, the mediation can occur at any time. If the case is complex, it may be better not to suggest mediation until after discovery. Also, the mediation can serve as a last effort at settlement right before trial, when both parties are concerned about how their case will play out in front of the fact-finder. Since mediation gives the parties the opportunity to control the outcome of the dispute, a growing number of litigants prefer to mediate rather than relinquish control to a judge or jury.

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PRACTICE 20 (1989). A mediator "diminishes the burden on lawyers whose clients are reluctant to accept their assessment of the case, or who fear that a settlement offer will convey an appearance of weakness." Id.; see also Calkins, supra note 5, at 297 (noting that a patient, determined mediator will have much more success than one who becomes confrontational with a party who has unrealistic expectations or has incorrectly evaluated the case).

37. See Calkins, supra note 5, at 281 (noting that one reason for the success of mediation is that all the parties can get together in one proceeding, where communication is simplified through a mediator who can present each side of the dispute and let each side know what the other wants to hear).

38. See id. (stating that in complex, multi-party situations, a mediator can meet with each party separately and confidentially, in order to piece together a reasonable solution to the dispute); cf. Mediation: A "Cathartic" Pressure Valve, supra note 21 (commenting that mediation is not appropriate for all employment disputes).

39. See EEOC to Refer Charges to Federal Mediators, MONT. EMPLOYMENT L. LETTER, Jan. 1997 (stressing the necessity for highly qualified mediators in employment disputes when the issues are complex).

40. See KNIGHT ET AL., supra note 10, ¶ 3:56 ("In more complex cases, it may be necessary to wait [with mediation] until sufficient discovery has been completed to give each party a fair idea [of the strength] of the other's position."); John W. Cooley, 15 Reasons for Using Mediation Besides Settlement, RES GESTAE, Jan. 1997, at 26, 27 (pointing out that the complexion of a complicated case could change dramatically several times during discovery).

41. See supra note 40.

42. See Phillips, supra note 31, § 26.7.
Cost containment is another compelling reason for early mediation. Obviously, the longer the plaintiff has to wait through a long, complicated discovery process and trial, the more the plaintiff suffers economically. Generally, the plaintiff is the party who is less able financially to withstand a lengthy, protracted dispute. In addition, the defendant may prefer a quick settlement, rather than suffering the increased legal fees and possible damage to the employer's reputation that can result from a long dispute. Therefore, mediation should be considered as early as possible.

C. Selecting a Mediator

Once the parties agree to mediation, the next step is selecting a mediator. Typically, both sides know mediators and will be able to agree on a choice, although the decision is not always easy. Sometimes, courts refer parties to a mediator; however, a mediator chosen by a judge may be less effective than a mediator agreed upon by counsel, because court-appointed mediators may not have experience in employment law issues. If a court orders the parties to use a specific mediator, the judge may rescind the order if advised that the parties have agreed to a different mediator.

When trying to agree on a mediator, one technique is to send the opposing attorney a list of mediators who are experienced in employment law cases. If the other attorney disagrees with all of the suggestions, the plaintiff's attorney can then ask the other side for a list of mediators. After receiving the list, the attorney can call

43. See GALTON, supra note 30, § 2.4; Norman, supra note 34, at 5 (discussing the advantages of mediation as compared to litigation, including cost, time, and human issues).
44. See Calkins, supra note 5, at 307 (noting that one advantage to mediating before filing a lawsuit is that the plaintiff saves the out-of-pocket expenses involved in litigation); Martin, supra note 18, at 36 (noting that the plaintiff may be unemployed and in financial trouble while the case is litigated).
45. See Stuller & Budman, supra note 15, at 32 (discussing the recent wave of jury verdicts in favor of fired executives).
46. See GALTON, supra note 30, § 3.10, at 22-23 (listing proposed steps for selection of a mediator, including calling fellow attorneys and asking for suggestions or questioning them about their experience with mediators).
47. See Nolan-Haley, supra note 8, at 59-61 (discussing the problems associated with court-referred mediators).
48. Cf. Fitzpatrick, supra note 12, at 114 (arguing that an experienced and knowledgeable mediator is necessary to reach a settlement).
49. See GALTON, supra note 30, § 3.10, at 23.
50. See Bencivenga, supra note 27, at 5 (commenting on the difficulties employment attorneys have in selecting a mediator).
the mediators and get some references. This enables the attorney to learn about the mediator's style. The object is to find a tough, strong, smart mediator who can push both sides toward settlement. Simply put, find a mediator without the word "impasse" in his or her vocabulary.

James J. Alfini describes mediators as "hashers, trashers, or bashers."\(^{51}\) Hashers are mediators who communicate each party's position to the other side without elaborating.\(^{52}\) Trashers focus on criticizing each party's position.\(^{53}\) Bashers are aggressive mediators who forcefully argue for compromise.\(^{54}\) Despite the label, bashers are preferable in most cases because their approach leads to settlement.\(^{55}\) Finding the right mediator is important, because some mediators just go through the motions, collect their fees, and declare an impasse at the first opportunity.\(^{56}\) Obviously, this is not the ideal mediator.

Other factors to evaluate when selecting a mediator include mediation training, practice background, and actual mediation experience.\(^{57}\) Training is important because mediation is a process.\(^{58}\) Courses involving lectures and hypothetical situations help mediators understand the process and develop useful techniques to facilitate settlement.\(^{59}\) A mediator is not required to be an attorney;

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52. See id. at 71.
53. See id. at 66.
54. See id. at 68.
55. See Calkins, supra note 5, at 278 (arguing that the mediator should be an active peacemaker between the parties); Grubbs, supra note 6, at 15. *But see* BUSH & FOLGER, supra note 8, at 12 (arguing that the primary duty of a mediator is not to reach a deal, but rather to empower the parties). While having a mediator who seeks to achieve peace between the parties and "empower" the parties may have its advantages, the more passive the mediator, the more likely the mediation will result in impasse, which means a wasted day of mediation. *See* Calkins, supra note 5, at 299.
56. See Calkins, supra note 5, at 299 (arguing that mediators often "give up too soon" and suggesting as a rule of thumb that mediators should not terminate the mediation until both parties refuse to pay further mediation costs).
58. See GALTON, supra note 30, § 3.1, at 8 (observing that a number of excellent mediation training programs are offered throughout the country); Phillips, supra note 31, § 26:6, at 10 ("The mediator's expertise is in the mediation process itself, and perhaps a specific field . . . .").
59. See GALTON, supra note 30, § 3.1, at 9 (stating that many training programs require observation of experienced mediators in an actual session); Calkins, supra note 5, at 304.
however, a legal background may be preferable because the mediator will be better able to value the case and play "devil's advocate" in the settlement negotiations. Further, it is an additional bonus to locate a mediator with experience in employment law and jury trials. The final factor, actual mediation experience, is not as important as the first two considerations. Nonetheless, while the number of disputes heard is not indicative of skill and quality, mediators become more confident and adept at resolving disputes with practice.

III. MEDIATION STRATEGIES

A. Who Should Attend the Mediation

Both parties attending the mediation should have full decision-making authority. On the plaintiff's side, both the client and the client's spouse or significant other should be present. It is unacceptable to be in the eleventh hour of mediation and have the client leave to telephone his or her spouse to ask if the dollar amount is sufficient. The spouse has not experienced the mediation firsthand and heard the convincing arguments of both sides. A spouse could very easily insist on more money without having been present all day. This could result in a wasted day of mediation. The attorney should ask the client, prior to mediation, if the client needs to consult with anyone before accepting a settlement. If so, that person should be present throughout the mediation.

In addition, the plaintiff's counsel should ask the defense counsel who will be present for the employer. If the company representative is the human resources director, that person typically has no authority to settle. Human resources personnel, and other management, probably will have to make phone calls during the

60. See GALTON, supra note 30, § 3.3, at 11 (stating that many mediated cases involve issues both of fact and law); Alan Alhadeff, What is Mediation?, in THE ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE, supra note 31, § 23:6 (stating that a skilled mediator challenges both parties to analyze their assumptions and support their positions); Phillips, supra note 31, § 26:6, at 10 (stating that a case may "turn primarily on factual issues where technical background is useful, or legal issues where a retired judge might be most helpful").

61. See GALTON, supra note 30, § 3.2, at 9 (arguing that experience is more important in complex disputes).

62. See id. at 62; Alhadeff, supra note 60, § 23.4.

63. See GALTON, supra note 30, § 6.3.

64. See id. at 62-63 (stating that the mediation process itself reveals subjective information that is difficult, if not impossible, to relay over the telephone).
mediation. As noted earlier, the mediation process is not conducive to phone calls. When the opposing party makes phone calls during mediation, the person on the other end of the line is not getting the full picture.\textsuperscript{65} Admittedly, this happens in at least half of the cases one of these authors mediates, and the bulk of the cases still settle; however, it delays the mediation and likely reduces the plaintiff's recovery. Therefore, it is essential to discuss with the defense counsel who will attend and what authority they will have to settle.\textsuperscript{66} If the plaintiff's counsel is in a position of power, he or she can insist that a decision-maker for the defense attend the mediation.\textsuperscript{67} Further, the plaintiff's counsel can go to the mediator or the court prior to mediation and ask their help in getting the proper decision-makers to attend.

Depending on the dynamics of the case, the attorney may use witnesses or experts at the mediation. The primary issue is "whether such experts' participation will be critical and useful at the session."\textsuperscript{68} If the answer is "yes," the attorney should inform the opposing counsel before the session.\textsuperscript{69} At the very least, the attorney should have expert witnesses available by phone. When bringing witnesses, the attorney must consider where they will sit and whether they will join the plaintiff in the caucus room or at the opening session. If the witnesses are in the caucus room, issues of waiving the attorney-client privilege may arise, so the attorney must exercise caution.\textsuperscript{70}

\textsuperscript{65} See id.
\textsuperscript{66} See Calkins, supra note 5, at 281 (discussing the importance of having all interested parties attend so they can experience the mediation firsthand).
\textsuperscript{67} See Bencivenga, supra note 27, at 5 (emphasizing the necessity of having the "key" decision-makers for the employer present at the mediation).
\textsuperscript{68} GALTON, supra note 30, § 6.5 (citing construction cases, emotional injuries, and lost wages as issues where an expert may be able to shed light on the subject and help the parties reach an agreement).
\textsuperscript{69} See id.
\textsuperscript{70} See Fitzpatrick, supra note 12, at 116-17 (describing the "fine line" that counsel must walk to persuade but not offend the opponent, extending even to where witnesses will be allowed to sit).
\textsuperscript{71} See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1985). The attorney-client privilege protects communications between attorneys, clients, and other privileged persons made in confidence. See RESTATEMENT (THIRD) OF THE LAW: THE LAW GOVERNING LAWYERS § 118 (Proposed Final Draft No. 1, 1996). A witness does not qualify as a privileged person for purposes of the attorney-client privilege. See id. § 120 cmt. g. Thus, if a non-privileged person is present during a discussion between the attorney and client, the "in confidence" aspect of the attorney-client privilege is absent. See id. § 121.
B. Preparing for Mediation

Mediation requires a considerable amount of preparation. One should fully master the facts of the case, as if going to trial or taking the deposition of a key witness. The client must be prepared as well. Before the mediation, the attorney and client should meet and discuss the exact procedure of the mediation, the client’s role at the session, the mediator’s role, and the attorney’s role. Most clients have no idea what mediation is or how it works. By properly preparing them for mediation, the chance of reaching a resolution increases.

In addition, when going to mediation, the attorney should prepare some demonstrative exhibits, showing the same charts or timelines that may be used at trial. The use of exhibits impresses upon the defendant that the plaintiff is prepared for trial and is serious about going to trial. Bringing photocopies of the charts to distribute to the defense counsel and the company representatives is another effective strategy. Presumably, the charts will be discussed in their caucus room and the potential effect of the exhibits on a trier of fact may entice the other side to settle the case.

Finally, an attorney should submit copies of relevant opinions to the mediator before the mediation. An attorney also should research employment law jury verdicts in the community and bring

72. See GALTON, supra note 30, at 69; Grubbs, supra note 6, at 15-17.
73. See GALTON, supra note 30, at 69 (suggesting the use of a checklist and providing possible topics of discussion for the meeting with the client); Grubbs, supra note 6, at 15 (recommending that the attorney contact the mediator to discuss the format of the mediation).
74. See GALTON, supra note 30, at 72 (stating that the client should prepare his or her remarks before the mediation); Grubbs, supra note 6, at 15-17 (stating that the client and the attorney should discuss whether the client will talk and what he or she will say).
75. See GALTON, supra note 30, at 69-70 (noting that the client should understand that the mediator is a neutral third party and that the conversations with the mediator are confidential); Grubbs, supra note 6, at 15.
76. See GALTON, supra note 30, at 70-72 (noting the importance of informing the client that the entire case will not be presented and that the final decision always belongs to the client); Grubbs, supra note 6, at 15-17.
77. See GALTON, supra note 30, at 102-03 (suggesting that exhibits be used to help persuade the mediator and the opposing side, but cautioning that such exhibits be used more selectively than at trial); Phillips, supra note 31, § 26:21, at 21.
78. See GALTON, supra note 30, at 55; Calkins, supra note 5, at 310 (stating that mediators normally are supplied with material that acquaints them “with the facts and law of the case”); Phillips, supra note 31, § 26:18, at 18 (noting that a short memorandum may also assist the mediator).
some of those statistics to the mediation. The verdicts or settlements from other area cases can guide the sides in valuing their case. Handing a summary or chart of this information to the defense counsel and the company representatives may also be effective.

C. The Opening Session

At a typical opening session of mediation, the plaintiff and the defendant sit on opposite sides of the table. The mediator sits at the head of the table and begins the process by explaining the purpose and ground rules of mediation. The mediator then defers to the plaintiff's counsel, who makes an opening statement.

The opening statement is one of the most important facets of the mediation process. Each side presents its position without interruption or comments. This step enables the attorneys to evaluate both the effectiveness of the other attorney and, in cases where a party speaks in the opening, it allows for the evaluation of that party as a witness. Due to the differing goals and audience, an opening statement at mediation is not the same as an opening statement at trial. In mediation, the attorney's remarks are directed to the opposing party — not the opposing attorney or the mediator.

An opening statement at mediation can run the full gamut from a short summary of the facts, liability, and damages to a dramatic opening statement similar to one the attorney would make to a jury. The appropriateness of the opening depends on the dynamics of the case; thus, the attorney must evaluate which type will work best in a given situation. In any event, the use of inflammable

79. See GALTON, supra note 30, at 75 (commenting that the opening statement can either do tremendous good or can destroy a client's chances for a favorable resolution); Phillips, supra note 31, § 26:21, at 21 (stating that an opening statement can show the other side that the client is willing and prepared to proceed to trial).

80. See Calkins, supra note 5, at 311.

81. See id. (stating that this is another reason why both the client and the attorney must be prepared for the mediation).

82. See GALTON, supra note 30, at 75 (stating that in mediation the other party is the jury, not a group of impartial people); Phillips, supra note 31, § 26:21, at 20 (stating that opening statements in mediation are used to establish a "we are going to settle" mentality).

83. See GALTON, supra note 30, § 4.2, at 29; Phillips, supra note 31, § 26:21, at 20 (emphasizing the importance of an effective opening statement because it is often the first and only opportunity to speak directly to the other party).
tory language and questioning the other side’s integrity or credibility is typically not recommended. Instead, attorneys should use nonlegal, understandable language and summarize the client’s case in a way that the defendant will understand. Above all, you want the other side to listen to you.

The next issue is whether the client will speak after the attorney finishes the opening statement. The mediator typically asks the client if he or she has anything to add; consequently, it is an issue that attorneys should discuss with their clients prior to mediation. If the client will speak, the attorney and client need to decide what the client will say. In most cases, the attorney will suggest that the client refrain from speaking at the opening session. This approach changes, however, if the company has its president or a person new to the case attending the mediation. In such circumstances, this is a good opportunity to have the new person hear the client’s story and see how painful it is to the client. The client should describe the suffering involved, but only if the client is a good witness. So again, the decision on whether the client should speak depends on the particular dynamics of the case.

Another consideration for the opening session is to contemplate what will happen if the case does not settle. If opposing counsel chooses to lay out his or her entire trial strategy in an opening statement, the plaintiff’s attorney should take copious

84. See Galton, supra note 30, § 9.2, at 78 (providing a complete list of opening statement “do nots”); Phillips, supra note 31, § 26:21, at 20 (stating that harsh words and threats are seldom, if ever, productive).
85. See Galton, supra note 30, § 9.1, at 76-77; Phillips, supra note 31, § 26:21, at 20 (noting that the attorney should “focus on the two or three best reasons why the other side should consider moving to a reasonable settlement position”); see also Leonard L. Riskin & James E. Westbrook, Dispute Resolution and Lawyers 105 (abridged ed. 1988) (stating that the opening statement should be designed to “build rapport with the other side”).
86. See Galton, supra note 30, § 4.3, at 31 (observing that venting by a client in front of the opposing party can hamper the ability to reach an agreement).
87. In addition, it may be desirable to have a particularly important witness speak during the opening session to impress upon the opposing side the strength of the case. Also, spouses may be allowed to talk during the opening session to describe some of their observations, particularly with regard to emotional distress damages. This is another way—in addition to charts and timelines—to let the defendant see what will be presented at trial.
88. See Grubbs, supra note 6, at 17 (discussing the importance of knowing the client’s goals at the outset of the mediation process and determining the client’s best alternative in the event that mediation is unsuccessful).
89. See Calkins, supra note 5, at 311 (commenting that in opening remarks, each party can evaluate the other’s argument and how effective the party will be
notes of the defense counsel's statement, because a jury may hear it in the future. Consequently, attorneys should exercise care in opening statements and not reveal arguments they might want a jury to hear first, or, at the very least, they may want to limit their strategy discussion to the arguments that already are contained in their pleadings. 90

D. After the Opening Session

After the opening session, the mediator first meets privately with the plaintiff. 91 In this first session with the mediator, it is important to impress upon the mediator that the plaintiff is very serious about the case and will take it to trial absent a settlement at mediation. Let the mediator know the strengths of the case and the seriousness of the settlement demand. To achieve an appropriate settlement, it is important to convince the mediator that the plaintiff has no reservations about going to trial.

The mediator will typically ask about the strengths and weaknesses of the case. 92 If the attorney reveals any weakness or problem areas with the case, the mediator will raise them throughout the course of the mediation. 93 If weaknesses exist, leave it to the opposition to identify them. The plaintiff's attorney can then explain to the mediator why, in fact, the alleged weaknesses are not a problem. Again, this is part of the strategy of convincing the mediator – early on – that the plaintiff has a strong case and is serious about going to trial.

The next consideration is whether the client will speak to the mediator once the other side leaves the room. Clients should be allowed to tell their stories. Most parties are satisfied with the mediation process, 94 often because it allows them to vent their frustrations. If they will not get to tell their story to a judge or jury, at least let them tell it to the mediator. Once the opening session is

as a witness).

90. See Fitzpatrick, supra note 12, at 114 (cautioning that the attorney must not reveal too much information unless he or she is convinced that the other side is committed to reaching a settlement).

91. See Calkins, supra note 5, at 311 (explaining that the purpose of the private caucuses between the mediator and the parties is to make each side objectively evaluate the strengths and weaknesses of the case).

92. See id.

93. See Fitzpatrick, supra note 12, at 117 (describing how mediators "probe and cajole" the parties during the day in an attempt to reach a settlement).

94. See Nolan-Haley, supra note 8, at 55 n.36 (listing sources that show the results of empirical studies reflecting litigants' high satisfaction with mediation).
finished, the client should do most of the talking. The lawyer should only interject to help direct the client to a particular issue, or to add information helpful to the negotiations. The client’s spouse or companion should also be involved in the discussion, because the people affected by the dispute will feel more satisfied with the process if they get to express their concerns.

Prior to mediation, the lawyer must explain to the client that during the private caucuses with the mediator, the lawyer and client must present a position of strength. They should project that they believe in their case and they have every intention of going to trial. The client should be warned that the mediator will say, “Wouldn’t you prefer to get it over with today?” or “You don’t really want to have to go on with this case and its aggravation for another two years, do you?” Mediators frequently use this technique, and if the client agrees, the mediator will use these admissions during the remainder of the mediation in an attempt to persuade the client to settle. Instead of agreeing, the client should comment on the strengths of the case.

E. Negotiating a Settlement Amount

Before the mediation, the attorney should objectively evaluate the case and discuss with the client an acceptable range for settlement. When evaluating the case, the factors to consider include:

1. What are the probabilities of a favorable litigation outcome?
2. What are the costs associated with the litigation?
3. How long of a delay will there be in obtaining a final decision in the litigation process?
4. What are your client’s interests in obtaining an expeditious resolution at mediation?
5. What is a reasonable monetary range of the value of the case from your perspective?

95. See Bencivenga, supra note 27, at 5 (stating that in mediation, the attorney should be conciliatory and counsel the client, rather than focus strictly on winning); Grubbs, supra note 6, at 16-17 (discussing the importance of deciding beforehand whether the client will speak and whether a "strategic advantage" arises by having the attorney speak about certain matters).

96. See Fitzpatrick, supra note 12, at 116 (discussing the therapeutic value of allowing the client to express his or her emotions, which in turn allows the parties thereafter to address "more tangible concerns").
6. What do you anticipate the other side's range of value to be?

7. Have you checked current jury verdicts or asked a competent, experienced attorney not involved in this case [his or] her assessment of value?97

Whatever the initial demand in mediation, it will have to be lowered, sometimes significantly, in order to settle. And, if any previous negotiations have occurred in the case, neither the mediator nor the defense will look favorably to the offer rising just prior to, or during, mediation. As a practical matter, this cannot be done, unless of course, an unusual change in circumstances occurs – like a newly-discovered “smoking gun.” As a result, if the parties negotiated prior to the mediation, the plaintiff's attorney should avoid dropping the offer too low, because once the session begins, this amount will drop even lower.

Typically, both parties are miles apart in terms of monetary values at the start of mediation. After several hours of mediation, the gap can still be significant. Neither party wants to be the first to make a “big leap.”98 While most practitioners likely believe otherwise, “the party who makes the first credible proposal[,] [or big leap, typically] controls the negotiation.”99 Making the first credible move is not a sign of weakness or lack of faith in the case; instead, it shows good faith and a willingness to negotiate a reasonable settlement.100

97. GALTON, supra note 30, § 10.1, at 81-82; see also Alhadeff, supra note 60, § 23:6 (stating that settlement is reached in mediation as a result of the private caucuses, in which the parties are able to discuss the case candidly with the mediator).

98. See GALTON, supra note 30, § 4.5, at 41 (“A credible number is not a number a party may be willing to pay or accept, but is instead one that encourages a party to perceive that the negotiation is moving into the realm of reason.”); see also Alhadeff, supra note 60, § 23:19, at 15 (noting that mediators typically ask each party for a legitimate range for settlement).

99. GALTON, supra note 30, § 4.5, at 41 (believing that the party making the first realistic proposal gains points with the other side and that subsequent “de minim[i]s proposals are excused or tolerated”).

100. See id.; see also Phillips, supra note 31, § 26:24 (“A positive attitude and efforts to be congenial can only serve to improve the level of communication and the possibility of resolution.”).
F. The Settlement Agreement

The attorney should not leave the mediation until a written agreement is signed by all the parties and their attorneys. If any problems are foreseen with the employer's "settlement agreement to follow," these issues should be resolved prior to leaving the mediation and, preferably, before a settlement is reached. Such issues could include the taxability, confidentiality, and time of payment of the settlement, or a positive reference letter. Most mediators have standard agreement forms that the parties can individualize to suit their needs. If not, the attorney should bring a standard settlement agreement on disk for editing at the mediation. The writing memorializing the agreement should be sufficiently clear and specific so post-mediation differences about what was agreed to can be avoided.

IV. OTHER FORMS OF DISPUTE RESOLUTION

While this Article focuses on strategies in conventional mediation, other forms of dispute resolution are also available. An attorney must be able to evaluate a case objectively to determine which alternative to the traditional adversarial process, if any, is most beneficial to the client. In addition to mediation, other methods of dispute processing are also gaining in popularity. These alternatives can be grouped into three categories: 1) adjudicative processes, 2) consensual processes (like mediation), and 3) mixed processes. A brief description of some of these methods is set forth below.

101. See Fitzpatrick, supra note 12, at 117 (asserting that the attorney should be prepared to draft the settlement agreement before leaving mediation); Phillips, supra note 31, § 26:27 (noting that any agreement reached during the mediation should be reduced to written form at the mediation).
102. See Calkins, supra note 5, at 312.
103. See id.
104. See GALTON, supra note 30, § 4.12.
105. See id.
106. Another process that may be used when the defendant is a small company or a religious company president is "Biblical arbitration." For parties who are either both Christian or both Jewish, a strict interpretation of the Bible would dictate that they resolve their dispute through religious arbitration. Under this alternative, the parties agree on a panel of priests, ministers, or rabbis to adjudicate the case under religious law. See generally Patti A. Scott, New York Divorce Law and the Religion Clause: An Unconstitutional Exorcism of the Jewish Get Laws, 6 SETON HALL CONST. L.J. 1117, 1117 (1996) (stating that religious law governs divorce in
A. Adjudicative Processes

1. Arbitration

Arbitration is the most commonly known and used alternative to a civil trial. In arbitration, the parties agree to submit their dispute to a neutral third party whom they have selected to make a decision. The arbitrator’s decision may be binding or non-binding. If it is binding, the parties have only very limited avenues to appeal the decision. In nonbinding arbitration, the decision is treated like an advisory opinion and any party who is unsatisfied with the result may proceed with a de novo trial.

The parties select the arbitrator, usually an attorney or “expert” with a background and experience in dealing with the issues in dispute. Because the parties can tailor the process to suit their needs, arbitration is less formal, less expensive, and faster than the judicial process. One criticism of arbitration, however, is that it often results in legal or integrative, “split-the-baby” solutions.

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108. See Riskin & Westbrook, supra note 85, at 120.
109. See Roth et al., supra note 107, § 1:3, at 5.
110. See Robert C. Field, The Decision to Arbitrate, in THE ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE, supra note 31, § 3:12 (stating that no general right of appeal or judicial review of errors of law or evidence is available in arbitration). Minnesota, for example, recognizes limited grounds for appealing an arbitration award. See MINN. STAT. § 572.19, subd. 1 (1996). The grounds for appeal are: (1) corruption, fraud, or undue influence, (2) evident partiality of the arbitrator, (3) the arbitrator exceeded the power granted, (4) the arbitrator refused to postpone the arbitration after just cause to do so was shown, and (5) an objection by a party that no agreement to arbitrate was in force. See id.
111. See Field, supra note 110, § 3:11, at 12.
112. See id. § 3:7, at 8-9 (stating that arbitrators should be selected by examining their education, experience, and personal qualifications).
113. See id. § 3:8 (stating that parties and witnesses generally are more comfortable in an arbitration setting than in a courtroom).
114. See id. § 3:5 (“[W]hile the direct costs of arbitration generally exceed the direct costs of a court proceeding, the legal fees and expenses usually are less.”).
115. See id. § 3:4 (observing that an arbitration can be resolved within one year whereas a lawsuit may not be resolved until two years after the complaint is filed).
2. Private Tribunals

Sometimes called “rent-a-judge,” this process is an option where statutes or rules of court permit a judge to refer cases to privately-selected neutrals paid by the parties. The dispute is presented to the neutral in the same manner as a civil lawsuit is presented to a judge. The private judge’s decision is binding but, unlike an arbitrator’s award, the judgment may be appealed.

This form of dispute resolution is useful when the case involves numerous technical matters that will need resolution during the course of litigation. It is also beneficial when the parties want the matter to remain private and want to eliminate delays and gain some ability to mold the proceedings to their particular dispute. However, a private tribunal usually is not recommended when the case involves simple issues or when a party cannot afford or does not want to pay for a private judge.

B. Consensual Processes

1. Early Neutral Evaluation

In early neutral evaluation (ENE), the attorneys present the core of the dispute to a neutral evaluator in the presence of the parties. The neutral typically is a private attorney or a retired judge with experience in the particular area of law. ENE usually occurs after the case is filed but before discovery. The evaluator provides a nonbinding advisory opinion, candidly assessing each

118. See id. at 281.
119. See id.
120. See Eric D. Green, Avoiding the Legal Logjam – Private Justice, California Style, in Corporate Dispute Management 65, 68 (1982) (noting that this process frequently is used in complex commercial cases, cases involving difficult technical questions, and cases involving a large amount of money).
121. See id. at 72.
122. See id. at 79-80.
parties' strengths and weaknesses. Even if a resolution is not reached, the neutral helps narrow the dispute.

ENE is most useful when the parties have very different views of the strengths and weaknesses of their side of the case. It is also beneficial if discovery and trial would be prolonged and expensive, or when the case involves high risk or technical and complex issues that need untangling.

2. Moderated Settlement Conference

The moderated settlement conference is another alternative to the traditional adversary proceeding. In this process, the parties select a panel of neutrals to hear the dispute. Each side presents its position, including proffers of evidence and testimony, to the panel. The panel then issues a nonbinding, advisory opinion on liability, damages, or both. This process is considered part of the settlement negotiations between the parties; thus, statements made during the conference are inadmissible in court.

The moderated settlement conference is most effective when the parties are at opposite ends of the spectrum on a particular aspect of the case. When this "sticking point" is removed, the parties may then be able to settle the case. However, this form of dispute resolution is not recommended when one or both of the parties view the case as a vindication of rights.

126. See Buckstein, supra note 124, at 39 (stating that the "basic concept behind early neutral evaluation is to seek [an] honest, unbiased opinion").
127. See id.
128. See id. (describing a scenario where the opposing sides misunderstood each other's positions and, once the confusion was explained, the parties were able to settle).
129. See id. (discussing the opportunity for opposing sides to ask questions of each other and explain their positions during ENE).
130. See Calkins, supra note 5, at 292 (stating that the panel consists of impartial third parties, usually attorneys, chosen by the parties).
131. See id.
132. See id.
133. See id.
134. See generally Carrie Menkel-Meadow, For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference, 33 UCLA L. REV. 485, 502-06 (1985) (describing the additional risks that arise in a settlement conference where the opposing parties are unwilling to compromise).
135. See id.
C. Mixed Processes

1. Mediation-Arbitration

Mediation-arbitration (med-arb) begins as a mediation. If the parties reach impasse, they arbitrate the deadlocked issues. The arbitration may be performed either by the person who mediated the dispute or by another neutral third party. This form of dispute resolution is gaining in popularity, especially in the area of labor-management relations.

This process is useful when the parties want a creative, less formalized process but also want a "tie-breaker." In addition, a resolution is more likely to be reached when the possibility of arbitration is just around the corner. However, when the same person acts as mediator and arbitrator, med-arb may be inappropriate. A party may be concerned that the mediation process will be "contaminated" by the possible role switch. In other words, one party may not want the neutral to decide issues when he or she has heard the other side tell an emotional story during the mediation.

2. Mini-Trial

A mini-trial is used primarily in business disputes. The goal of the mini-trial is to define the issues and develop a basis for realistic settlement negotiations. In a mini-trial, both sides make an abbreviated presentation before a panel chosen by the parties. The panel is composed of a neutral advisor and a selected representative for each side, usually a decision-making executive of the

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137. See id. at 665.
138. See Sam Kagel & Bette J. Roth, Med-Arb (Mediation-Arbitration), in The Alternative Dispute Resolution Practice Guide, supra note 31, § 37:8 (stating that in "pure" med-arb situations, the mediator-arbitrator conducts both the mediation phase and the arbitration phase).
139. See Riskin & Westbrook, supra note 85, at 5.
140. See Kagel & Roth, supra note 138, § 37:5, at 5.
141. See Goldberg et al., supra note 117, at 271 (discussing possible business situations where good-faith disagreements, emotional barriers caused by personal antagonism, or inabilities to respond to the needs and rights of all the parties exist).
143. See id. § 38:16.
organization. After the presentations, the neutral gives an opinion about the likely outcome if the matter proceeded to trial. Then, the party representatives meet in private, with or without the neutral advisor, to negotiate a settlement.

This process is most appropriate when the dispute involves complex questions of mixed law and fact and when litigation is apt to be long and costly. Mini-trials are also useful when neither party has a realistic idea of the strength of the other side’s case or when settlement is a possibility if key decision-makers participate in settlement discussions.

3. Summary Jury Trial

The summary jury trial is similar to a mini-trial, but differs in that it involves a lay jury. Attorneys make abbreviated presentations of their position before a panel of jurors. The jury, which is drawn by the court from a list of real jurors, has no authority to render a binding verdict; however, the jury usually is not informed that the decision is not binding. The jury’s nonbinding verdict serves as a basis upon which to build a settlement. This whole process ordinarily takes only one day and is recommended in the event of failed mediation. Sometimes, summary jury trials are court-ordered, not consensual.

144. See id. § 38:7, at 10.
145. See RISKIN & WESTBROOK, supra note 85, at 5.
146. See id. This is just one format the mini-trial may take. In another model, the neutral advisor does not render an opinion unless the party representatives on the panel are unable to reach an agreement. Armed with the advisory opinion, the representatives enter into further negotiations; and if an agreement is not reached after this point, the dispute returns to court for further proceedings. See Calkins, supra note 5, at 289.
147. See GOLDBERG ET AL., supra note 117, at 275 (listing patent, products liability, contract, unfair competition, and antitrust cases as examples of disputes in which mini-trials may be helpful).
148. See Yarn, supra note 142, § 38:5, at 7.
149. See id. § 38:2, at 3.
150. See id.
151. See Calkins, supra note 5, at 289-90 (stating that the jury is not told that its verdict is only advisory so it will take its job seriously).
153. See Katz, supra note 123, at 13.
The summary jury trial is helpful in disputes where the parties have vastly differing opinions of how a jury will evaluate the case.\textsuperscript{154} This process allows the attorneys to try abbreviated versions of the case before a live jury and gives them an opportunity to question the jurors about the verdict.\textsuperscript{155} The summary jury trial has proven effective in several types of cases, including age, gender, and race discrimination actions.\textsuperscript{156}

V. CONCLUSION

One of the most appealing aspects of alternative dispute resolution is the flexibility it provides attorneys and their clients in fashioning the most appropriate process to resolve the dispute. Although this Article focuses on the use of mediation in employment disputes and briefly describes other well-known forms of alternative dispute resolution, no rule limits parties or their attorneys to these definitions. An attorney experienced in alternative forms of dispute resolution can extract and combine key elements of these various processes to create the best method for resolving a particular dispute.

No matter what method of dispute resolution is utilized, the ultimate goal of the attorney is to achieve the result most beneficial to the client. Mediation is an excellent way to attain this goal. However, mediation, like any other form of dispute resolution, has its own traps and pitfalls for the unwary. The strategies outlined in this Article should help better prepare the attorney for the mediation process so the attorney can focus on the ultimate objective – a favorable resolution.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{154} See Goldberg et al., supra note 117, at 282 (describing the process as a tool for evaluating parties' strengths and weaknesses).
\item \textsuperscript{155} See Calkins, supra note 5, at 290. Costs associated with compensating a jury might be restrictive, even though settlement becomes very likely after the process is completed. See id. at 290.
\item \textsuperscript{156} See Lambros, supra note 152, at 472. In addition, the summary jury trial has been successful in litigation involving negligence actions, products liability, personal injury, contracts, and antitrust claims. See id.
\end{enumerate}
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