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Success at Mediation: How to Define and Accomplish It

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By
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I. INTRODUCTION

Success at Mediation: How to Define and Accomplish It is an introductory guide into the world of mediation by Raymond G. Chadwick.[1] Chadwick relies on his over forty-year career as both an attorney and as a mediator to provide insight as to how to best navigate through mediation. *Success at Mediation* serves as a guide through the mediation process, not by instructing the reader as to how to succeed at mediation, but rather by providing insight as to techniques that may work. By including chapters on preparation, as well as alternatives to mediation, Chadwick provides an introduction to mediation that is useful to those who wish to enter the world of mediation.

II. OVERVIEW

Success at Mediation consists of 24 chapters, covering various aspects of the mediation process. While Chadwick does not divide the book into parts, the chapters naturally group themselves into sections by covering related topics. For simplicity's sake, I have organized the chapters into these groups and will discuss each chapter in relation with itself and with the section as a whole.

Part I of *Success at Mediation* covers the first three chapters of the text.[2] Starting with what "success" means in mediation and covering the basics of mediation, the book introduces the reader to the mediation process, and provides a basis of where to start. Part II consists of the "who, when, and why" of mediation, covering chapters four through nine.[3] Part III, consisting of chapters ten through thirteen, covers preparing all involved parties for mediation.[4] Part IV, chapters fourteen through nineteen, discusses mediation strategies, such as negotiation, business mediation techniques, and multi-party mediations.[5] Part V, chapters twenty through twenty-three, looks at the relationship

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[1] RAYMOND G. CHADWICK, SUCCESS AT MEDIATION: HOW TO DEFINE AND ACCOMPLISH IT (2015). Ray Chadwick has over four decades of experience as a litigator, mediator, and arbitrator. Mr. Chadwick started his own mediation and arbitration group, Chadwick Mediation & Arbitration, LLC, and has been faithfully serving the Georgia legal community ever since.

[2] *Id*. at 1-8.

[3] *Id*. at 9-21.

[4] *Id*. at 22-35.

[5] *Id*. at 36-65.

between the lawyer and mediator and the ethical rules to which both must adhere.[6] Part VI, chapters twenty-four to twenty-seven , covers alternatives to mediation, such as early neutral evaluation, arbitration, and special masters.[7] The final chapter, "Keys to Success/Keys to Failure," will be addressed in the conclusion of this review.[8]

III. PART I: DEFINING THE BASICS

A. Success at Mediation—What Is It?

Chapter One jumps right into defining "success" in the context of mediation. Covering not even a full two pages, Chadwick starts by acknowledging that "success" in mediation differs greatly from success in litigation.[9] Success in the courtroom means winning, but success in mediation means achieving results that are in the best interests of the client.[10] Pointing out the uncertainties of trial,[11] Chadwick concludes the chapter by providing several dictionary definitions of "success" and notes that "[c]oncluding a case on terms decided by your client, with your professional guidance, constitutes success."[12]

B. Familiarity and Basics

Chapter Two, titled "Why all Lawyers Should Be Familiar with Mediation," establishes that even lawyers who do not litigate, and have no plans to ever step into a courtroom, could find mediation useful. [13] Pointing out that non-litigators will likely advise clients in matters that may lead to litigation, Chadwick suggests that a non-litigator's knowledge of mediation can not only save costs, but can also increase a client's confidence in their attorney.[14] Chadwick also uses Chapter Two to point out that non-litigators may find mediation helpful because of their "specialized or historical

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[6] CHADWICK, *supra* note 1, at 66-86.

[7] *Id*. at 87-100.

[8] *Id*. at 101-103.

[9] *Id.* at 1.

[10] CHADWICK, *supra* note 1, at 1.

[11] Some of the uncertainties of trial include the unpredictability of a jury, the win/lose mentality. Chadwick defines success as "the accomplishment of an aim or purpose," or "the favorable outcome of something attempted. CHADWICK, *supra* note 1, at 1.

[12] *Id*. at 1-2.

[13] *Id*. at 3.

[14] CHADWICK, *supra* note 1, at 3-4.

knowledge to the dispute," suggesting that an attorney's specialized field of knowledge may prove to be essential to resolving disputes in that field outside of court.[15]

Chapter Three, helpfully titled "First Some Basics," begins by defining mediation as assisted negotiation.[16] Chadwick establishes that mediation is private, confidential, and informal, and that it is designed to not only be an alternative to litigation, but also designed to be conciliatory in nature, rather than adversarial.[17] Pointing out the highlights of mediation, such as its lack of formalized rules and the role that the parties play in determining the outcome, Chadwick's general overview provides an introduction to mediation.[18] Despite a lack of formal structure, "mediation most often begins with a joint session."[19] In this joint session, both parties, either by themselves or with their counsel, are present with the mediator.[20] The alternative, however, is for the mediator to "caucus," or hold individual sessions for each individual if the relationship between the parties is particularly tense.[21]

Assuming, however, that the mediator begins with an initial joint session, Chadwick recommends that the mediator begin by explaining the mediation process and its benefits, and then invites the parties to make a presentation or preliminary statement to explain their side of the case.[22] Following the initial joint session, the mediator separates the parties and conducts individual meetings.[23] As Chadwick points out, it is in these private meetings where most of the negotiation begins. [24] Chadwick identifies the process as "shuttle diplomacy," as the mediator not only presents each party's views, but also their demands, offers, and counter-offers.[25] The style of mediation that the mediator takes veers in one of two directions. It can either be a "facilitative" style, where the mediator engages the parties in discussions to help them assess the risks and focus on their intentions while never directly stating their own opinion, or it can be an "evaluative" style, where the mediator is free to express opinions and suggest solutions to the parties.[26]

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[15] *Id*. at 4.

[16] *Id*. at 5.

[17] *Id*. at 5.

[18] *Id*. at 6.

[19] CHADWICK, *supra* note 1, at 6.

[20] *Id*.

[21] *Id*. at 6.

[22] *Id*. at 6.

[23] CHADWICK, *supra* note 1, at 7.

[24] *Id*. at 7.

[25] CHADWICK, *supra* note 1, at 7.

[26] *Id*. at 7. *See* Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 ALTERNATIVES TO HIGH COST LITIG.. 111, 111 (1994). *See also* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 23-24 (1996). Leonard

Chadwick concludes the chapter by discussing the pros and cons of each style of negotiation, without an analysis of the benefits and detriments of the styles, with the ultimate conclusion that most lawyers involved in mediation appreciate some evaluative feedback from the mediator.[27]

IV. PART II: WHY, WHEN, AND WHO?—THE BASIC QUESTIONS OF MEDIATION

If the first three chapters address the "what" aspect of mediation, the second set of chapters cover the other basic questions: who, when, and why should someone mediate? Covering a mere eleven pages, Chadwick uses these chapters, short as they are, to give his own insight in answering these basic questions.

A. Why?

The "why" aspect of mediation is divided into two parts: first, why does mediation work? The second question posed is "Why mediate?" Chapter Four, "Why Does Mediation Work?," tackles that first question. Chadwick begins with reminding the reader that the purpose of mediation is "making peace, not war."[28] Using a process that takes away the adversarial aspects allows mediators to work with the parties to develop and reach a mutually acceptable compromise.[29] Pointing out that no one party gets everything that he or she wants, Chadwick establishes that mediation helps bring out parties' rational sides, helping them to cool strong emotions and accept a good deal, rather than risk everything at a trial with an unpredictable jury.[30] Chadwick highlights the calmer nature of mediation, because it gets rid of the "posturing" and adversarial conduct seen so often in litigation.[31] By pointing out the elimination of posturing, and the reduction in advocacy bias,[32] Chadwick draws the conclusion that mediation "allows the parties to 'hear each other' either directly, through the mediator, or both."[33] Another benefit to mediation that Chadwick points out is that mediation is flexible, in that parties

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Riskin is the attorney who developed the evaluative/facilitative perspective, and almost single-handedly revolutionized how mediators approach mediation sessions. *See also* Nancy Welsh, *The Thinning of Self-determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 27-28 (2001).

[27] CHADWICK, *supra* note 1, at 7-8.

[28] *Id*. at 9.

[29] *Id*. at 9.

[30] *Id*. at 9-10.

[31] CHADWICK, *supra* note 1, at 10.

[32] *Id*. (Chadwick defines advocacy bias as "the natural tendency of parties and their lawyers to perceive their side of the case as stronger than it may actually be.").

[33] *Id*.

can come to a creative solution that may not be available to them in trial.[34] Chadwick concludes this chapter with a sentence summing up the benefits of mediation: that it is flexible, allows for creative solutions that would not be available in litigation, and is more "realistic" in perspective than litigation.[35]

Chapter Five, "Why Mediate," ties directly into the previous chapter, as Chadwick uses the three-page chapter to delve into what one could call the more "personal" reasons for mediating. Pointing out that jury trials lead only to a win or a loss, Chadwick reminds readers that the parties "control [their] destiny" through mediation.[36] Another benefit to having the parties come up with their own solution through mediation is that the parties are in the best position to understand their situations, even more than a judge or jury can through formalized procedures.[37] There is also a psychological aspect to mediation: It is important for people to have a neutral party—in this case the mediator— hear their side of the story and empathize, even if that person cannot make any decisions for them.[38] Another psychological benefit to mediation is that it is significantly less stressful than going to trial. Chadwick notes "I have never met a client who looked forward to testifying and being cross-examined."[39] Mediation produces a "no lose/no lose" situation because both parties (theoretically) leave the session with an agreement that, while not giving them everything that they wanted, gives them a "good enough" outcome. The fact that a mediation leads to a "no lose/no lose" situation only contributes to that alleviation of stress. [40] The final reason why someone should mediate is that it allows for easier settlement.[41]

These two chapters seem a bit repetitive, as Chadwick essentially restates reasons why mediation is a process that people should consider in solving disputes: mediation is less messy than litigation, with a better chance at getting an outcome that both parties find mutually acceptable. While this is certainly true, the text's apparent derision of the trial process prevents the book from making a successfully convincing argument. In a book as short as this one is, the repetition is overbearing as the book is designed to be an introductory guide. Chadwick's theories would be more convincing to readers had they been condensed into one chapter.

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[34] CHADWICK, *supra* note 1, at 10 ("[Mediation] provides the opportunity to craft solutions that a judge or jury cannot: in serious personal injury cases one may be a structured element; in business disputes, an agreement for future mutually beneficial business arrangements . . . .").

[35] *Id*. at 11. *See also* Daniel Bent, *Game Theory: Explains How Mediation Can Trump Litigation*, HAW. B. J. (June 2003) ("When particular obstacles to resolution present themselves during mediation, creative options can arise that are not even on the radar screen in litigation.").

[36] *Id*. at 13.

[37] *Id*.

[38] CHADWICK, *supra* note 1, at 13.

[39] *Id*.

[40] CHADWICK, *supra* note 1, at 13.

[41] *Id*. at 14.

B. When?

The "When" portions of this text are split into two chapters: Chapter Six and Chapter Nine. A short jump ahead in the text is required, as Chadwick mentions court-ordered mediation in Chapter Six, but then does not address it again until Chapter Nine. Chapter Six covers "when" a person should go into mediation. Chadwick suggests that the best time to undergo mediation is after the parties believe that they have enough information to make decisions in their best interests.[42] That being said, it is important to keep in mind that each case is unique, and that it is sometimes better to begin mediation immediately before or after filing a suit.[43]

Even the circumstances of the mediation are impacted by the "when." Voluntary mediation is helpful when the case is particularly complex, but court-ordered mediation is also not unusual, and can be very helpful in resolving cases without getting the courts heavily involved.[44] Chadwick does offer one timeframe when mediation is not helpful: close to the start of a trial.[45] Having mediation begin close to trial does not allow enough time for a settlement, as mediation often allows the parties to discover more about their cases which may require additional filings.[46]

Chapter Nine, titled "Court-Ordered Mediation: Why it is a Good Thing," addresses the very real fact that not all cases lead to voluntary mediation, and that the court must sometimes give an order to resolve things peacefully, outside of litigation.[47] Pointing to the fact that more and more judges are ordering parties to go to mediation before going further in the litigation process, Chadwick theorizes that courts appreciate court-ordered mediation for the fact that most cases never go to trial, and settle.[48] Chadwick also points out that most attorneys like court-ordered mediation, because it saves time and brings about the possibility of settlement more quickly than litigation would.[49] Another reason attorneys like court-ordered mediation is that some attorneys

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[42] CHADWICK, *supra* note 1, at 15.

[43] *Id*. at 16 (beginning the mediation process is best done "in many instances, sooner, rather than later because costs are reduced and a settlement permits them to end their uncertainties, their anxieties and concerns from litigation.").

[44] CHADWICK, *supra* note 1, at 16. *See also* Nancy Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573 (2004).

[45] *Id*. at 16.

[46] CHADWICK, *supra* note 1, at 16.

[47] *Id*. at 20.

[48] *Id*. at 20. *But see* Heeden, Timothy, *Coercion and Self-Determination in Court-Connected Mediations: All Mediations Are Voluntary, But Some Are More Voluntary Than Others*, JUST. SYS. J. 26 (2005) 273, *HeinOnline*.

[49] CHADWICK, *supra* note 1, at 21.

believe suggesting mediation is a sign of weakness, and having a court-ordered mediation takes out that appearance of weakness.[50]

C. Who?

Chapter Seven, the shortest chapter in the book at mere two paragraphs, covers who should mediate. In short, anyone or any business who has any legal dispute should consider mediation as an option instead of trial, as mediation can handle any type of legal dispute.[51]

Chapter Eight builds on the prior chapter in addressing the process of choosing a mediator. According to Chadwick, there are two mindsets in picking a mediator. One is to select a mediator with expertise in the subject of the matter that is the source of the conflict.[52] The second strategy is to pick a mediator that counsel knows and who has a reputation of being a quick study.[53] Chadwick expresses a preference for the "quick study" mediator who has a history of many different mediations in a variety of subjects, as that variety gives the mediator the experience to deal with any situation.[54] However, Chadwick does not discount the occasional necessity for choosing a mediator who specializes in a complex subject, as that technical knowledge would only help the parties.[55]

Chadwick uses the rest of the chapter to identify the key qualities and traits that a mediator should have. Skills such as:

- being able to develop a rapport with the parties,
- being persistent,
- being direct with clients and counsel,
- providing meaningful reality checks about the state of a case and the risks of trial,
- providing "evaluative" advice when asked,
- experience in knowing "when there should be a 'lawyers only meeting,'"
- patience,

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[50] *Id*. at 21.

[51] *Id.* at 17.

[52] *Id*. at 18. *See also* Bobby Marzine Harges, *Alternative Dispute Resolution Symposium: Mediator Qualifications: The Trend Toward Professionalization*, 1997 BYU L. REV 687 (1997).

[53] *Id*.

[54] CHADWICK, *supra,* note 1, at 18.

[55] *Id*. at 19.

- and willingness to assist in continuing negotiations even if the case does not settle are all important skills in picking a mediator that all parties can trust and rely on.[56]

The most important trait, however, is possessing an ability to gain people's trust.[57] Building trust between mediator and client is key, for if the clients cannot trust the mediator's advice, then there would be no point to having a mediation.[58]

V. PART III: PREPARING FOR MEDIATION

Chapters Ten through Thirteen are arguably some of the most helpful chapters in the text, as Chadwick directly advises the reader on how to best prepare for mediation. Covering not only who to prepare for mediation (short answer: everyone), but how to do so, Chadwick's advice is both simple and straightforward.

Chapter Ten, "Preparing Yourself for Mediation," is one of the more concrete chapters in the book, and signals the text's move past introducing the basics of mediation, and into the real substance of the book. As Chadwick notes, it is extremely important to prepare oneself for mediation, just as one would prepare for trial.[59] Chadwick guides attorneys new to the mediation process by establishing a series of "steps" to take in preparation for mediation. That being said, the steps are fairly simple and logical. The first step an attorney should take in preparation for mediation is to pick the right time to mediate.[60] Referring back to Chapter Six, Chadwick reminds the reader that the best time to engage in mediation is after sufficient discovery has been done by both parties.[61] Chadwick clarifies this point further by explaining that "although you may not have completed all the discovery you would like, you should be at the point where you are prepared to go to trial if you should need to."[62] The second step is the selection of the mediator. Drawing upon Chapter Eight, Chadwick uses this step to remind readers to pick a mediator who has a good "bedside manner."[63] Another suggestion that attorneys

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[56] CHADWICK, *supra,* note 1, at 19.

[57] *Id*. at 19.

[58] CHADWICK, *supra,* note 1, at 19.

[59] CHADWICK, *supra* note 1, at 22.

[60] *Id*. at 22.

[61] *Id*.

[62] CHADWICK, *supra* note 1, at 22.

[63] *Id*. at 23. The Merriam-Webster Dictionary defines "bedside manner" as "the way a doctor or nurse behaves with patients." (while Chadwick does not define the term in relation to mediation, he does say that it is important to select a mediator "who is good with people" who would be "helpful in dealing with emotional plaintiffs who are unfamiliar with the judicial process." This would suggest that Chadwick recommends picking mediators who are compassionate and gentle with parties who are nervous or upset.)

can use is asking the other attorney if they have any suggestions for a mediator.[64] While it might seem unusual to ask your opponent to suggest the mediator, as it seems to take away power from you and your client, the strategy is a sound one, as it would be more difficult for your opponent to reject anything that the mediator says or does while in session. Another piece of advice offered by Chadwick is to pick a mediator who has experience doing work for both plaintiffs and defendants, as the mediator will be better able to empathize with the clients and interact fairly with both.[65] The final step is to have the proper mindset going into the mediation: make peace, not war.[66]

The rest of the chapter addresses preparing for what may occur in the actual mediation. Chadwick recommends being prepared for the mediator's "reality testing" questions, which cause an attorney to address the strengths and weaknesses not just of their own cases, but of the opposing party's as well.[67] Questions like "[w]hat do you think your opponent and [their] client believe their strengths are and why do you think they believe that?" or "what do you think your opponent and [their] client believe are your weaknesses and why do you think they believe that?" are necessary to make attorneys address the facts realistically.[68]

The next step is to prepare your client for mediation. Chapter Eleven, "Preparing Your Client for Mediation," teaches readers how to do just that. The first step to take in preparing one's client is to fully explain what mediation is, how it works, expected confidentiality, and the role of the mediator.[69] Doing so calms the client, and allows them to be better informed about the decisions they will make.[70] Explaining the benefits of mediation—the degree of control the client gets to retain, the certainty of the result, time saved, cost-effectiveness, and confidentiality— help reassure the client that mediation is a solution that is in their best interest.[71] Preparing the client also takes place in different ways. Tips such as reminding the client that it is important to dress appropriately, and making an attempt at being polite and congenial can help establish

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[64] *Id*. at 23.

[65] *Id*.

[66] CHADWICK, *supra* note 1, at 23.

[67] *Id*. at 24.

[68] *Id*, at 26.

[69] CHADWICK, *supra* note 1, at 27-28.

[70] CHADWICK, *supra* note 1, at 28. *See also*, Roselle L. Wissler, *Court-Connected Mediation: Process Viewed as Fair and Non-Coercive in Ohio Civil Cases*, DISP. RESOL. MAG., Spring 2002, at 30 (parties who were better prepared for mediation by their attorneys felt less pressured to settle and felt that the mediation process was more fair than did parties who were less prepared. "Interestingly, attorneys who did more to prepare their clients for mediation also felt the mediation process was more fair than did attorneys who did less client preparation.").

[71] CHADWICK, *supra,* note 1, at 29.

boundaries for the client that he or she will know how to follow.[72] A lack of instruction can lead a client to feeling like they are floundering.[73]

Because the mediator is a neutral third party whose only "client" is the settlement, it is necessary to prepare the mediator for the process.[74] Most mediators ask for written submissions before the mediation, so that they have a better understanding of the issue before the session begins.[75] Chadwick recommends making a submission even if the mediator does not ask you to, in a simple outline that highlights the client's case as you see it.[76] Another helpful suggestion is to propose a phone conference between yourself, the mediator, and opposing counsel to brief the mediator on the positions of the parties, issues to work through, and procedural matters.[77] Likewise, a private phone call with the mediator can help.[78]

The next stage of preparation is addressed in Chapter Thirteen, "Preparing Your Opponent for Mediation." While preparing opposing counsel for mediation may seem counterintuitive, Chadwick points out that if the attorneys are competent, everyone would find out everything non-confidential before trial starts.[79] Moreover, educating your opponent about your side of the case helps reduce advocacy bias on both sides, allowing for a more sincere effort towards settlement.[80]

VI. PART IV: MEDIATION STRATEGIES

Chapters Fourteen through Nineteen address different mediation strategies that attorneys may use in preparing for an impending mediation session.

A. Mediation Advocacy and Negotiation

Chapter Fourteen, "Mediation," instructs the reader on the difference between mediation advocacy and trial advocacy. In Chadwick's eyes, mediation advocacy "is a

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[72] *Id*. at 30-31.

[73] *Id*. at 30-31.

[74] *Id*.

[75] CHADWICK, *supra,* note 1, at 32.

[76] CHADWICK, *supra,* note 1, at 32-33 ("Support [the outline] by key facts and, where necessary, applicable law. Point out the strengths of your side of the case and the weaknesses in your opponent's . . . .").

[77] CHADWICK, *supra* note 1, at 33.

[78] *Id*. at 34.

[79] *Id*.

[80] *Id*. at 34-35.

blend of presentation, discussion, and negotiation."[81] Breaking down mediation advocacy into five stages[82], Chadwick addresses each stage in turn, and provides advice to the readers as to how to best utilize this type of advocacy. The first stage, "pre-mediation advocacy," simply means educating your mediator and opponent as to the important facts and applicable law to ensure a fair evaluation of the case.[83] Chadwick recommends using the strategies suggested in Chapters Twelve and Thirteen for this step. The second step takes place at the beginning of the mediation during the initial joint session. When making preliminary statements, Chadwick advises being credible, using non-inflammatory language, and avoiding grandstanding.[84] The key is to create doubt in your opponent that they may not win a trial. Another strategy is to address the other side, rather than the mediator, in opening remarks, as it is opposing counsel whom you will be working primarily with.[85] Using visual aids, such as diagrams, charts, photographs, or videos may be extremely helpful, if appropriate.[86] The next stage occurs at the private caucuses, where it is just you, your client, and the mediator. In these private caucuses, it is important to be realistically confident about your client's case and your chances of winning at a jury trial.[87] Another way to convince the mediator of your sincerity is to ask the mediator about their thoughts, or ask them to start being evaluative, rather than fully facilitative.[88] Stage four occurs when you no longer believe that you can reach a settlement. The advocacy that occurs at this stage depends on your relationship with opposing counsel, and can either involve you speaking directly to opposing counsel, or expressing to the mediator that you believe the mediation is done, which allows the mediator to test the other side to see if a solution can be found.[89] The final stage occurs post-mediation, and requires the attorneys to keep in contact with the mediator if a settlement had not been reached.[90]

Another strategy to take is to negotiate. Chapter Fifteen instructs the readers how to negotiate at mediation. Once again emphasizing the importance of utilizing doubt as your greatest weapon, Chadwick encourages the reader to avoid antagonizing or insulting

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[81] CHADWICK, *supra* note 1, at 36.

[82] *Id*. at 36 (explaining that these five stages are before the mediation begins, at the beginning of the session at the joint session, during the session in the individual sessions, near the end when an impasse has been reached, and after the mediation when no solution has been reached).

[83] *Id*. at 37-38.

[84] *Id*. at 38-39.

[85] CHADWICK, *supra* note 1, at 39.

[86] CHADWICK, *supra* note 1, at 39-40.

[87] *Id*. at 40-41.

[88] *Id*. at 41.

[89] CHADWICK, *supra* note 1, at 41-42.

[90] *Id*. at 42.

the other side by asking for too much or proposing too little.[91] While some degree of posturing or "puffing" is expected, Chadwick advises that keeping an open mind and being flexible in your negotiations with the other side is actually the best way to ensure a result that both sides are satisfied with.[92] Taking incremental steps, following the advice of the mediator, and remembering to stay patient are some of the most crucial steps that the lawyers involved can take.[93]

B. Special Mediations: The Multi-Party Mediation and the Business Mediation

The next two chapters of the text address two different types of mediations that call for specific preparation, outside of mediation advocacy and negotiation. Chapter Sixteen addresses multi-party mediations, as having multiple parties can be stressful for both lawyers and mediators.[94] Addressing first the problems that plague multiple defendants in multi-party mediations, Chadwick recognizes that the problem of assigning degree of liability and responsibility for damages is particularly stressful for defendants.[95] One way to handle mediating degrees of fault is to create a ballot or chart that each defendant confidentially fills out, allotting a percentage of fault and contribution that each defendant has to pay, and gives to the mediator.[96] For dealing with multiple plaintiffs, the problem may arise from one plaintiff wanting to settle, and one plaintiff refusing to do so. In such an event, Chadwick recommends either withdrawing and recommending to each plaintiff to retain their own counsel, or to obtain permission from the non-settling client to participate in the other plaintiff's mediation efforts.[97] When dealing with multiple attorneys for multiple parties, Chadwick recommends following a ballot system similar to the one he proposes for multiple defendants in apportioning rewards.[98]

Chapter Seventeen addresses mediating business disputes. Chadwick acknowledges that counseling clients about business disputes is significantly different from counseling a client in a personal injury or will issue.[99] While addressing the

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[91] CHADWICK, *supra* note 1, at 43-44.

[92] *Id*. at 44.

[93] *Id*. at 45.

[94] CHADWICK, *supra* note 1, at 46 (multi-party mediations "may present both practical difficulties as well as ethical concerns, and the classic 'like herding cats' simile is commonly appropriate.")

[95] *Id*. at 46-47.

[96] *Id*. at 47 ("An advantage of this exercise is that it gives the defendants important information on what must be negotiated between or among them…[and] may also help provide a 'reality check' to a defendant who is not being realistic as to responsibility and risk assessment . . . .").

[97] CHADWICK, *supra* note 1, at 48.

[98] *Id*. at 49.

[99] *Id*. at 50.

benefits of mediation and the disadvantages of litigation are important, identifying those benefits or disadvantages are somewhat different. Establishing the cost of litigation in comparison with the cost of mediation, the impact of disruption in regular business that litigation causes, and the lack of confidentiality in trial are all persuasive factors that an attorney should explain to a business client.[100] Pointing out other side effects, such as the potential harm to important business relationships, the amount of time litigation gets, and the fact that there is a chance of losing also are effective strategies to take.[101] Another effective strategy is creating a cost-benefit analysis for the client that covers a variety of sub-issues, such as the history and importance of the business relationship, the potential costs involved, and coming up with acceptable outcomes.[102] This chapter is a tantalizing introduction to the world of business mediation, leaving interested readers wanting to know more. A list of sources would have been a welcome accompaniment to this chapter, as Chadwick's brief chapter fails to go in depth. A list of additional sources would not only provide additional information but would also have increased the credibility of Chadwick's writing.

C. The Psychology of Mediation and The Role of the Mediator

Chapter Eighteen addresses the "Psychological Barriers to Success."[103] Acknowledging these barriers is an important strategy, as keeping them in perspective will help attorneys stay honest with themselves, their clients, and the mediator in addressing the issues of the case. Some psychological barriers include advocacy bias (previously discussed), certainty bias, which causes an overestimation of the degree of certainty in answering questions of outcome, cognitive dissonance, and reactive devaluation.[104] Chadwick's conclusion to this chapter is that one of the jobs of a mediator is to help counsel and parties acknowledge their biases and work past them.[105]

The conclusion to Chapter Eighteen segues into Chapter Nineteen, "What Mediators Do to Help Settle Cases." With the understanding that mediators are neutral parties, readers are encouraged to remember that the "fundamental goal of any mediator is to help the parties settle their dispute."[106] Breaking up the types of techniques mediators may use through the different stages of the mediation process, Chadwick cautions the reader that the list is representative of the techniques that may be used—not

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[100] CHADWICK, *supra* note 1, 51.

[101] *Id*. at 52.

[102] CHADWICK, *supra* note 1, at 52-53

[103] CHADWICK, *supra* note 1, at 54.

[104] *Id*. at 54-55.

[105] *Id*. at 55.

[106] CHADWICK, *supra* note 1, at 56. *See also* John W. Cooley, *Mediation, Improvisation, and All that Jazz*, 2007 J. DISP. RESOL. 325 (2007).

exhaustive.[107] The first set of techniques applies at the pre-mediation stage, and include such techniques as requesting pre-mediation submissions from counsel, as mentioned in Chapter Twelve.[108] Pre-mediation telephone calls are another technique that a mediator may choose to adopt.[109]

The joint session calls for rapport-building and establishing trust.[110] Private caucuses call for a variety of techniques that change throughout the course of the mediation session. Techniques such as asking general questions might be better for the initial private caucus, but mediators will draw away from those general questions to ask reality-testing questions as time passes.[111] If permitted, another technique mediators may utilize is offering suggestions, expressing optimism, talking about the experience of others, and helping lawyers deal with their unrealistic clients.[112] If the mediation comes to a point where nothing appears to work, the mediator has the option to call a meeting of just the attorneys, leaving the clients out, so that the mediator may candidly address the attorneys about the problems that he or she sees.[113] Other techniques the mediator may utilize include asking "what if" questions, asking for a last offer or last demand, or throwing things back on the lawyer to get clarification.[114] If no approach has worked, then the mediator may suggest that the parties agree to reconvene at a later time, rather than just ending the mediation.[115]

VII. PART V: THE RELATIONSHIP BETWEEN MEDIATORS AND LAWYERS—A LOVE-HATE RELATIONSHIP, AND SOME THOUGHTS ON ETHICS

A. *The Love-Hate Relationship Between Lawyers and Mediators*

Chadwick devotes two chapters discussing the relationship between lawyers and mediators. Chapter Twenty, "What Lawyers Like and 'Hate' about Mediators and Arbitration," discusses the relationship from the lawyer's point of view, while Chapter

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[107] *Id*. at 57.

[108] CHADWICK, *supra,* note 1, at 57.

[109] *Id*. at 58.

[110] CHADWICK, *supra,* note 1, at 58.

[111] CHADWICK, *supra* note 1, at 58-62.

[112] *Id*. at 62-64.

[113] *Id*. at 64 ("This approach often reduces posturing and creates understanding as to why certain positions are being taken.")

[114] CHADWICK, *supra,* note 1, at 64-65.

[115] *Id*. at 65.

Twenty-One, "What Mediators 'Hate' About Lawyers," looks at the other side of the relationship.

Chapter Twenty consists of four lists: what lawyers like about mediation, what lawyers do not like about mediation, what lawyers like about mediators, and what lawyers dislike about mediators. Drawing on what had previously been written in the text, these lists are fairly simplistic and do not provide any in-depth analysis. An example of what a lawyer might like about mediation is that it calls for preparation, as addressed in Chapters 10-13.[116] In short, the chapter does not contribute anything to what the reader has already read, making it seem repetitive and unnecessary.

In contrast to Chapter Twenty, however, Chapter Twenty-One, "What Mediators 'Hate' About Lawyers," is eight pages, making it one of the longest chapters in the book, and goes in-depth about the frustrations that mediators often have with attorneys. Chadwick lists fifteen different complaints against attorneys such as "change of pre-mediation demand/offer," surprising the mediator with new information, failing to prepare, grandstanding, and "coming in with a negative attitude," among others. The harshness of Chadwick's critique in this chapter detracted from his message, as the severity of his critique was rather off-putting.[117] While it is certainly important to be aware of such negative traits, the approach Chadwick takes leaves the reader feeling alienated from the text and feeling guilty for something that they may have never done.

B. Ethics of Mediation

Chapter Twenty-Two, only vaguely goes into the ethical rules lawyers must follow, which is practical considering that each state has its own rules of professional ethics and conduct for attorneys. The first ethical rule an attorney should follow is being competent in the area of law that is the subject of mediation.[118] Competent representation, in Chadwick's eyes, also includes adequate representation,[119] and also includes discussing the benefits and risks of the trial, performing cost-benefit analysis, and fully explaining all aspects of mediation.[120] Other ethical rules, such as withdrawing when there is a conflict of interest, participating in mediation in good faith, and refraining from ex parte communication if required by a court.[121] Confidentiality, the last ethical rule that Chadwick brings up, is an important rule because the general rule is that all statements made at mediation are confidential.[122]

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[116] CHADWICK, *supra,* note 1, at 66.

[117] CHADWICK, *supra,* note 1 at 69-75.

[118] *Id*. at 77. *See also* MODEL RULES OF PROF'L CONDUCT (2015).

[119] *Id*.

[120] CHADWICK, *supra,* note 1 at 78.

[121] *Id*. at 78-81.

[122] *Id*. at 81.

Mediators are also subject to ethical obligations, which is the topic of discussion for Chapter Twenty-Three. Mediators are expected to ensure party self-determination, by not forcing parties into accepting a settlement that they do not agree with, being impartial, avoiding conflicts of interest, avoiding providing legal advice, maintaining confidentiality, ensuring their competency to mediate, and truthfully advertising their expertise.[123]

VIII. PART VI: ALTERNATIVES TO MEDIATION

Chapters Twenty-Four through Twenty-Seven cover alternatives to mediation that still allow the lawyer and client to avoid litigation.

A. Med-Arb and Arb-Med

Chapter Twenty-Four, "Med-Arb/Arb-Med," covers two hybrid procedures that are combinations of arbitration and mediation. Chadwick points out that these hybrid processes are most commonly used in business or commercial cases when a contract contains a clause requiring the use of either process if a dispute arises.[124] Med-Arb begins with mediation, and proceeds to a binding arbitration session if a solution cannot be achieved through mediation. Chadwick advises that should parties choose Med-Arb as an option, that they pick two neutral third parties. One neutral third party would serve as the mediator, and another to serve the arbitrator, which would prevent disclosure of confidential information.[125] Arb-Med, on the other hand is designed to "avoid the possibility of a 'tainted' arbitrator since arbitration comes first."[126] Unlike Med-Arb, however, the arbitrator of the Arb-Med session may be the mediator as well, as there is no concern over "tainting" the arbitrator.[127]

B. Mediate or Arbitrate?

Deciding whether to arbitrate or mediate is a matter to be discussed between attorney and client. After giving a brief introduction to the subject of arbitration, Chadwick lists both the benefits and disadvantages of arbitration. Such benefits include

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[123] CHADWICK, *supra* note 1, at 84-86. *See* MODEL RULES OF CONDUCT FOR MEDIATORS (2005). Mediators should avoid giving legal advice as not all mediators are attorneys. Moreover, as a neutral third party, mediators are not permitted to give legal or financial advice.

[124] CHADWICK, *supra,* note 1, at 87.

[125] *Id*. at 88.

[126] *Id*. Arb-Med is designed so that arbitration occurs before the mediation session. The arbitrator hears all evidence and renders a non-binding advisory decision, which is then discussed in the mediation session.

[127] CHADWICK, *supra,* note 1, at 88.

efficiency, cost savings over a trial, and confidentiality. Some disadvantages include the fact that there is limited discovery, arbitration is more expensive than mediation, and may not be directly enforceable.[128] Unlike mediation, arbitration is binding, and can only be overturned in court; even then, the support for the authority of arbitration is binding.[129] This chapter displays a bias towards mediation, as it spends more time pointing out the complexity of arbitration in contrast to the simplicity of mediation, its cost, and lack of client control.

C. Early Neutral Evaluation

Chapter Twenty-Six covers early neutral evaluation, a process "pioneered" in California in the 1980s that is a hybrid procedure that calls on a neutral third party to evaluate the case and give a professional estimate as to what a jury or judge would do based on the known facts and law.[130] An informal process, the evaluator identifies the claims, defenses, significance of established law, likely verdict, range of damages if plaintiff is successful, and value of the settlement.[131] After explaining the process of early neutral evaluation, Chadwick explains that the role of the neutral evaluator is to provide a safe environment for the parties to establish their positions in the case, encourage the parties to consider settlement, and assist in settlement discussions if requested.[132] Chadwick seems very complimentary of early neutral evaluations, unlike arbitration, as it seems closer in nature to mediation.

D. Special Masters and Mediation

Chapter Twenty-Seven, the penultimate chapter of the text, covers a unique role called "the special master." The special master's role is to "assist a court in some specific aspect(s) of a case determined by the judge."[133] Special masters may sometimes be called upon by the parties to help mediate their case.[134] Chadwick references his own work as a special master, and expresses confidence in the fact that the process is more efficient than trial, and saves clients both time and money.[135]

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[128] CHADWICK, *supra* note 1, at 89-91.

[129] *Id*. at 93.

[130] CHADWICK, *supra* note 1, at 94-95.

[131] *Id*. at 95.

[132] *Id*. at 96-97.

[133] *Id*. at 99.

[134] CHADWICK, *supra* note 1, at 99.

[135] CHADWICK, *supra* note 1, at 100.

IX. CONCLUSION

In Chapter Twenty-Eight, the final chapter of the text, Chadwick discusses the keys to success and failure. The chapter reviews in list format all of the advice that Chadwick gave over the course of the text.[136] By reviewing these keys to success, Chadwick cements the importance of mediation, as well as the best way to prepare for it.

While I found *Success at Mediation* to be a helpful introductory guide for attorneys who may not be familiar with the mediation process, I found myself at times rather frustrated with the book's set up. With some chapters spanning only a couple of pages—and in the case of Chapter 7, one page—the layout is extremely choppy and does not seem especially focused. Several chapters could have very easily been condensed into larger chapters that would have flowed more smoothly than they currently do in their broken-up structure. As useful as much of the advice was, Chadwick's open distaste for litigation was at times off-putting and made it harder for me to believe what he was saying. I also found myself wishing for a list of references in the text while I was reading. Providing sources for his claims would not only provide credibility to Chadwick's claims, but would also provide interested readers with sources for moving forward.

That being said, the advice provided throughout the text is nonetheless sound, and as such, the text serves as a fair introductory manual to mediation. An aspect of the book that I enjoyed, but did not discuss in the main body of the article, is the useful set of documents found in the Appendices. These documents include a mediation checklist, recommendations for a successful mediation, and a sample "Agreement to Mediate" form. Despite the frustrating structure of the text, I found Chadwick's candid style to be a mostly welcome aspect of the text, his style reminding me less of a dry read and more of an enjoyable lecture by a college professor. While at times the unrestrained tone was distracting, I otherwise enjoyed it. I would recommend *Success at Mediation* to any person interested in learning about mediation.

[136] *Id*. at 101-03.