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MEDIATION ADVOCACY: REPRESENTING CLIENTS IN MEDIATION

By
Jonathan R. Vaitl*

I. INTRODUCTION

Mediation Advocacy: Representing Clients in Mediation is written by Stephen Walker.¹ Walker wrote the book to provide attorneys and clients with a foundational understanding of mediation in order to get the most out of the process.² Walker presents the book as one of practicality, rather than one of theory, and roots it in the mediation practices of mediators in England and Wales.³ Although he contextualizes the book in a specific geographic location, Walker's advice easily applies to any jurisdiction, given some adjustments for any "local rules." Throughout the book, Walker clearly focuses on the practice of mediation, rather than mediation theories. His brief discussion of theoretical models of mediation serves as a quick survey to introduce readers to the different models and make them aware that various models exist. Walker frequently provides hypothetical scenarios to demonstrate the practical aspects he discusses, and he includes checklists after certain chapters to help attorneys navigate things such as settlement and mediation agreements, mediation statements, and mediation files. The addition of checklists and examples helps the reader visualize and imagine the practices that Walker discusses.

In *Mediation Advocacy*, however, Walker fails to provide his information in a logical fashion. Although the book does generally progress from introduction to practical advocacy, several chapters seem to be out of place. For example, in Part A, Chapter 4, Walker writes about what mediators do, then in Part B, Chapter 9, he expands on mediators' "tricks." This disjunctive approach makes the book seem less like a "beginning to end" approach to mediation advocacy and more like an extended contemplation on the practice of mediation, where backtracking would be less bothersome. Walker wants this book to be a practical guide, though, and such backtracking makes little sense.

Ultimately, Walker's book provides useful information for attorneys and students interested in learning about good mediation representation; however, getting the best out of the book may require that readers jump around and not progress through the book in chronological order. I see that as a significant flaw for a practical guide but not one that detracts from the excellent content that Walker provides.

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¹ STEPHEN WALKER, *MEDIATION ADVOCACY: REPRESENTING CLIENTS IN MEDIATION* (2015). Stephen Walker is an independent civil and commercial mediator. He has conducted over 300 mediations, is dual accredited in the United States through the International Academy of Dispute Resolution, and is a Visiting Lecturer in Mediation at Kings College London.

² *Id.* at v.

³ *Id.*

II. OVERVIEW

Walker broadly organizes *Mediation Advocacy: Representing Clients in Mediation* into three main parts. Part A, “Introduction to Mediation Advocacy and the Mediation Process,” provides the reader with context for understanding mediation as one option in the world of alternative dispute resolution. The first part also explains initial concepts, such as who mediators are, what mediators do, what clients want, how to perform a risk/benefit assessment, and when and where to hold a mediation.⁴ Part B, “The Mediation,” fleshes out how a typical mediation proceeds, how to prepare for mediation, the mediation and settlement agreements, and what happens after mediation.⁵ Part C, “Mediation Advocacy Skills and Techniques,” teaches readers about negotiation techniques and includes a chapter to help would-be mediators assess themselves as mediators.⁶ Walker also includes a chapter at the end about self-advocacy.⁷ He attempts to organize the book according to eight core principles which overlap and curiously do not cover every portion of the book.⁸ Walker then identifies three core concepts: (1) three tasks that lawyers perform (analysis, advice, and advocacy), three classic stages of mediation (exploring, exchanging, and formulating), and three actual stages of mediation (advocacy, problem-solving, and negotiation).⁹ Finally, Walker discusses three lessons that readers should take from the book: “rebalance,” in which the lawyer prepares for mediation with a focus on formulating and structuring settlements rather than presenting the client’s position; “reorientate,” in which the lawyer and client change their mindset toward making peace and finding a solution; and “recognize,” which pertains to the research that neuroscientists have done to show how we make decisions.¹⁰

⁴ WALKER, *supra* note 1, at 3-160.

⁵ *Id.* at 161-284.

⁶ *Id.* at 285-334.

⁷ *Id.* at 335-56.

⁸ Walker’s principles include:

(1) mediation is for making peace not war; (2) peace is made by negotiating deals; (3) not every negotiation is a mediation, but every mediation is a negotiation; (4) the process of negotiation is a process of the mutual recognition of reality—your own and the other person’s; (5) deals are made by discussing proposals, not by arguing; (6) preparation for mediation is preparation for peace talks; (7) negotiation leads to action—it is different from a discussion or debate—a successful negotiation leads to a decision, which leads to action; and (8) people make decisions and settlements for their reasons not yours.

Id. at 6-8.

⁹ WALKER, *supra* note 1, at 8-10.

¹⁰ *Id.* at 11.

III. THE PROCESS OF MEDIATION

A. The Right Mindset for Mediation and Determining What Clients Want

Parties who want to “win” pursue litigation, but parties who want to find a mutually agreeable solution turn to mediation.¹¹ Walker writes that many attorneys struggle with this distinction and bring a war mentality to mediation, in part because that is how they were trained.¹² Attorneys and mediators must work together to ensure that the clients can achieve the desired resolution. Obviously, attorneys can only achieve what their clients want if they *know* what their clients want. Walker suggests that knowing what the client wants can be difficult because clients often do not know.¹³

Walker recommends three questions for determining what a client wants: “What does the client need?”; “What does the other side need?”; and “What can they give to the other side?”¹⁴ Walker divides client needs into two categories: psychological and financial.¹⁵ Psychological needs can further divide into the need for acknowledgement and the need for fairness.¹⁶ An impartial mediator can satisfy the need for fairness, and attorneys can satisfy a client’s need for acknowledgement by expressing the client’s view in an inoffensive manner, acknowledging the other side’s point of view with the hope that the other party will reciprocate, or allowing the client to speak his or her point of view to both the other side and the mediator.¹⁷ With respect to the client’s financial needs, Walker cautions that clients will often exaggerate losses, making it even more important that lawyers dig deeper to determine what the client actually needs to move forward.¹⁸

¹¹ WALKER, *supra* note 1, at 6.

¹² *Id.* at 90 (writing that many attorneys “believe that attack is the best defense and that they must get their retaliation in first”); *see also* Jean R. Sternlight, *Lawyers’ Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 274 (1999) (stating that “lawyers need to be particularly vigilant in guarding against their own tendencies to behave in mediation exactly as they would in litigation” and should, instead, “work toward mutually beneficial rather than win-or-lose situations”).

¹³ WALKER, *supra* note 1, at 78.

¹⁴ *Id.* at 80-87.

¹⁵ *Id.* at 80.

¹⁶ *Id.* at 80-83. Acknowledgment recognizes the fundamental desire to express feelings and have them be heard. Fairness, Walker notes, is a universal need when people are in dealings with each other, relevant across different cultures and economic groupings. Walker also includes “sacred values” in this category, which include such needs as protecting one’s reputation, preserving one’s sense of identity and self-worth, or avoiding embarrassment. *See also* David A. Hoffman and Richard N. Wolman, *The Psychology of Mediation*, 14 CARDOZO J. CONFLICT RESOL. 759, 765-66 (2013) (stating that the prevailing theme among clients in mediation is an “account of having been wronged” and that what clients want the most, psychologically, is “to feel that [they] are right, [they] are blameless, [they] are good”).

¹⁷ WALKER, *supra* note 1, at 80.

¹⁸ WALKER, *supra* note 1, at 84.

Lawyers who spend time thinking about the second and third questions—what the other side needs and what the client can give to the other side—are better able to put their clients in the right mindset by viewing the mediation in terms of how to structure a settlement rather than how to win.¹⁹

Mediators also have a range of techniques they can use to uncover what clients want and nudge them toward a resolution.²⁰ Walker suggests that attorneys can help themselves maintain a proper mindset by remembering the different techniques that mediators may use during a mediation.²¹ For example, attorneys should understand that mediators use small talk to build rapport with clients and may do so even when the client's attorney is not present.²² Walker writes that this practice is not “sinister,” and attorneys should not feel threatened by it.²³ Attorneys must also understand that mediators occupy a dual role: simultaneously establishing a rapport with each side and making each party think that the mediator is on that party's side, while also assessing the dispute objectively to effectively guide the parties to a resolution.²⁴

The mediator's opening statement may draw on a few approaches, according to Walker.²⁵ The standard approaches invite the parties to respond to the other side, or the mediator may choose to take a more directive approach and set forth what he or she sees as the issues to be resolved.²⁶ The mediator may also use the opening statement to allow for the parties to express their feelings, which also segues into the venting technique.²⁷ Walker notes that venting encourages not only a “flood of talk but also a torrent of emotion,” which may actually be counterproductive.²⁸ Walker suggests, as an alternative to venting, that mediators “reframe” emotion by restating something one of the party's

¹⁹ *Id.* at 84-87.

²⁰ *Id.* at 79. Walker describes the process of uncovering what the client wants as the PIN paradigm, which stands for position, interests, and needs. A client's position is “a statement of legal rights combined with an expression of determination to achieve them.” Interests refer to “what will in fact benefit the client and may be, and often are, not expressed in any legal document.” Needs are “those things which the client has to have.” Walker admits that the PIN paradigm is more of a teaching tool than a technique for use in mediation.

²¹ *Id.* at 163.

²² *Id.*

²³ WALKER, *supra* note 1, at 163.

²⁴ *Id.* at 164.

²⁵ *Id.* at 166.

²⁶ *Id.*

²⁷ *Id.* at 166-68. Venting involves encouraging the client to freely express negative emotions, often in a “forceful or passionate way.” *Id.* at 168.

²⁸ WALKER, *supra* note 1, at 168; *see also* Don Ellinghausen Jr., *Venting or Vipassana? Mindfulness Meditation's Potential for Reducing Anger's Role In Mediation*, 8 CARDOZO J. CONFLICT RESOL. 63, 69 (2006) (stating that venting can actually revitalize anger and “by expressing anger like that, you are strengthening the roots of anger in yourself”).

said without the emotionally charged language or echoing what the speaker said so the speaker can hear what it sounds like.²⁹ Another technique, known as “reality testing,” often strikes attorneys and clients as confrontational, making it even more important that the attorney be aware of it. Mediators using this technique press the parties to think about the experience they will have if they do not agree on a settlement and, instead, continue on to litigation.³⁰ Mediators may also become confrontational by separating clients from their lawyers—or creating a “wedge” between them—if the mediator sees the lawyers stalling or obstructing the process.³¹

When it comes to offers, the mediator may opt for a few strategies. One is to have the parties actually exchange offers.³² Another strategy is for the mediator to approach a party with an offer from the other side but ask the party to guess as to the offer first, which provides a glimpse into how well the two sides are reading each other.³³ The mediator may also prefer sealed offers, in which both sides provide a sealed, confidential offer to the mediator, who then tells the parties how far apart they are.³⁴

In his discussion of having the right mindset and knowing what the client wants, Walker provides good foundational information, but his presentation is lacking. Not only do his chapters seem repetitive at times, but he also fails to group the chapters in a more logical way. Chapters that address the mediation mindset are separated by 80 pages of material about different topics. With better organization, Walker’s great content would come through more effectively.

B. Preparing for Mediation: When and Where to Hold Mediation, Risk/Benefit Assessment, and Physical Preparation

1. When and Where to Hold Mediation

Although he defines mediation as a voluntary process, Walker admits that the parties often are required to mediate by contract or rules of civil procedure.³⁵ Courts in England and Wales favor enforcement of contractual mediation clauses, so long as the clause is certain, defines the process for choosing and paying the mediator, and sets forth

²⁹ WALKER, *supra* note 1, at 169.

³⁰ *Id.* at 170-71.

³¹ *Id.* at 172.

³² *Id.* at 174.

³³ *Id.*

³⁴ WALKER, *supra* note 1, at 174-75.

³⁵ WALKER, *supra* note 1, at 131. It is important to remember that Walker is writing from the perspective of the law of England and Wales, and it is that set of civil procedure rules that apply.

with sufficient clarity the process for the mediation.³⁶ Under the civil procedure rules, parties are expected to explore alternative means of resolving the dispute, with mediation being a central component.³⁷ The courts favor mediation to such a degree that the court may punish parties who unreasonably refuse to mediate by depriving them of costs even if they are successful at trial, imposing indemnity costs, or ordering a higher rate of interest on damages.³⁸

If the parties decide to mediate, then determining where to host the mediation requires some thought. Walker points out that using a neutral venue adds expense and introduces the additional complication of whether the venue is available at a time that is equally convenient for both parties.³⁹ In Walker's view, the most convenient option is to have one of the parties host the mediation, which also happens to be the most common arrangement.⁴⁰ Walker argues that, contrary to popular perception, the visiting party holds a psychological advantage over the hosting party because the visiting party has a greater power to walk away from the mediation, as compared to the hosting party who may have a hard time "walking away" in its own office.⁴¹

2. Risk/Benefit Assessment

Before mediation begins, attorneys should carry out a pre-mediation analysis (PMA) to determine the risks and benefits of both sides.⁴² Risk analysis involves determining litigation risk, determining net cash position, and summing the differences.⁴³

³⁶ *Id.* at 132.

³⁷ *Id.* at 134-36.

³⁸ *Id.* at 137. Determining whether a party's decision not to mediate was unreasonable rests on a 6-factor analysis derived from *Halsey v. Milton Keynes General NHS Trust*, [2004] EWCA Civ 576 (Eng.), which include: "(1) the nature of the dispute, (2) the merits of the case, (3) how far other settlement methods have been tried, (4) would mediation costs be disproportionately high, (5) would mediation cause delay, and (6) did mediation have a reasonable prospect of success." See also Jacqueline Nolan-Haley, *Mediation Exceptionality*, 78 FORDHAM L. REV. 1247, 1261 (2009) (noting that *Halsey* removed the ability of the courts to compel mediation, which resulted in an immediate decline in demand for mediation).

³⁹ WALKER, *supra* note 1, at 149.

⁴⁰ *Id.*

⁴¹ *Id.* at 149-50.

⁴² Walker describes the PMA more completely as

establishing with the client specifically what his goal is by way of settlement; how bad it will be for him if he does not achieve this; how he can fund ongoing litigation; how he can fund a settlement; what are the obstacles to settlement; how they can be overcome; what is the client's appetite for risk; what is the client's capacity for sustaining a loss at trial; what is the impact of loss at trial on the client; what is the impact of settlement now on the client; what is the client's net cash position after trial compared with what it would be after settlement; what are the client's BATNAs [Best Alternative to a Negotiated Agreement], WATNAs [Worst Alternative to a Negotiated Agreement], PATNAs (Probable

Walker writes that lawyers and clients habitually calculate litigation risk incorrectly.⁴⁴ Without quantifying litigation risk, attorneys and clients can fall victim to the optimism bias, in which both claimants and defendants overestimate their chances of success at trial.⁴⁵ Walker proposes that attorneys break down the case into its components and identify the likelihood of success at trial on each component, then multiply them together to reach an overall probability of success.⁴⁶ Calculating net cash position looks at three possible scenarios: a good day in court (winning 100%), a bad day in court (losing 100%), and a middle-ground day in court.⁴⁷ Considering the two numbers together—both the probability and the net cash position in different scenarios—encourages the parties to consider their positions monetarily, which provides a concrete analysis rather than conceptual ideas such as having a “good chance of winning” in court.⁴⁸

Once the attorney and client analyze the risk and net cash positions, they must calculate the impact and value of settlement.⁴⁹ Settlement can have both monetary and non-monetary value to a party. For instance, non-monetary value can include healing of wounds, saving reputation, freeing up time, protecting third parties, or maintaining relationships, among others.⁵⁰

3. *Physical Preparation*

Physical preparation for mediation breaks down into the mediation statement and the mediation file.⁵¹ Neither side is required to prepare a mediation statement, but Walker suggests that each party does.⁵² The statement does not restate the case or attempt to

Alternative to a Negotiated [Agreement], or RATNAs (Realistic Alternative to a Negotiated [Agreement]); and reviewing the strengths and weaknesses of the client’s case and the other side’s case.

WALKER, *supra* note 1, at 115-16.

⁴³ *Id.* at 116; *see also* David P. Hoffer, *Decision Analysis as a Mediator’s Tool*, 1 HARV. NEGOT. L. REV. 113, 114 (1996) (recommending a decision tree with main branches for litigation and settlement).

⁴⁴ WALKER, *supra* note 1, at 116.

⁴⁵ *Id.* (noting that claimants tend to give themselves a higher chance of winning than defendants give themselves).

⁴⁶ *Id.* at 117.

⁴⁷ *Id.*

⁴⁸ *Id.* at 119.

⁴⁹ WALKER, *supra* note 1, at 121.

⁵⁰ *Id.* at 122 (writing that, although many nonmonetary value factors cannot easily be quantified, many clients find that they can assign some dollar value, even if it is not an exact science).

⁵¹ *Id.* at 203.

⁵² *Id.* at 208.

persuade the other side to agree, but instead the statement seeks to assess the dispute with an eye toward the benefits of settlement for both sides.⁵³ Walker, in fact, recommends that attorneys prepare a draft settlement agreement at the same time that they prepare the mediation statement to further underscore the goal of reaching settlement.⁵⁴ Each side typically writes the mediation statement after speaking with the mediator and usually provides the mediator with a copy and exchanges statements with the other party.⁵⁵ Walker recommends writing the mediation statement before preparing the mediation file because the statement will help refine the attorney's thoughts about the case, which helps the attorney limit the mediation file to only the necessary documents.⁵⁶ The mediation file should include "pleadings; key documents referred to in the pleadings; correspondence about settlement; plans and photographs; schedules of loss, damages, etc.; and cost details for both sides."⁵⁷

Walker's advice for preparing for mediation goes into excellent detail, especially when he explains what should go into a mediation file. However, he again struggles with organization, as these chapters are not logically grouped together but, instead, are scattered throughout the book. His advice would be more effective if he presented it in a step-by-step fashion, particularly because he touts this book as a practical guide.

C. What to Expect from Mediation: Mediation Models and the Stages of Mediation

1. Mediation Models

Walker identifies four fundamental mediation models: facilitative, evaluative, transformative, and narrative.⁵⁸ A mediator using the facilitative model does not evaluate the parties' dispute and may not want any documents or background information before the mediation.⁵⁹ The facilitative model involves three stages: exploration, exchange, and

⁵³ *Id.* at 212.

⁵⁴ WALKER, *supra* note 1, at 219.

⁵⁵ *Id.* at 215.

⁵⁶ *Id.* at 207.

⁵⁷ *Id.* at 218.

⁵⁸ WALKER, *supra* note 1, at 59-63. Walker notes that as many as 25 different mediation models have been identified, but that a "working mediation advocate does not need to have a deep knowledge of them all. A familiarity with the most important ones and an ability to recognize the others is enough."

⁵⁹ *Id.* at 64. Walker states, however, that it is "impossible not to be evaluative to some extent" and that, as the mediation carries on, mediators tend to evaluate the dispute more. Parties may want the mediator to provide more evaluation, or the mediator may begin to feel more knowledgeable about both the parties and the facts that the mediator begins to form an opinion.

formulation.⁶⁰ During the exploration stage, the mediator elicits the parties' initial positions, what the parties hope to achieve, and how the parties hope to arrive at what they want to achieve.⁶¹ The exchange stage allows the mediator to correct any misunderstandings between the parties regarding their positions.⁶² Finally, at the formulation stage, the mediator assists with formulating proposals between the parties.⁶³

The evaluative model, on paper, differs somewhat from the facilitative model in that the mediator becomes more involved in reviewing the dispute and related documents and offers an opinion on the merits.⁶⁴ The transformative model reacts to the facilitative principle that mediation is not about changing the behavior of the parties but finding a solution to the dispute.⁶⁵ Under the transformative model, the mediator will help the parties see their past behavior and determine a way of reforming that behavior, not only to resolve the current dispute, but also to preempt future disputes.⁶⁶ Finally, the narrative model is based on the idea that "language creates reality" and that "there is no such thing as objective truth."⁶⁷ Mediators using the narrative model attempt to deconstruct the parties' individual narratives and help them see the dispute from another point of view.⁶⁸

The "big four" models provide a useful glimpse for advocates into the basic theory of how a mediation can progress. Walker writes that, in practice, mediators typically do not stay firmly within a particular model.⁶⁹ However, he recommends that advocates have a basic familiarity with the different underlying philosophies and the different ways that mediators actually operate.

⁶⁰ *Id.* at 65.

⁶¹ *Id.*

⁶² *Id.*

⁶³ WALKER, *supra* note 1, at 65.

⁶⁴ *Id.* at 66-68. However, Walker points out that, in practice, many mediation commentators dispute the difference, noting that even in the facilitative model, mediators eventually offer their opinion. *See also* James H. Stark, *The Ethics of Mediation Evaluation: Some Troublesome Questions and Tentative Proposals, from an Evaluative Lawyer Mediator*, 38 S. TEX. L. REV. 769, 791 (1997) (stating that ethical issues also arise for an evaluative mediator, as "concern about the appearance of partisanship may constrain the type of advice" an evaluative mediator will likely give).

⁶⁵ WALKER, *supra* note 1, at 66.

⁶⁶ WALKER, *supra* note 1, at 69 (noting that this model is not commonly used in the United Kingdom).

⁶⁷ *Id.* at 70 ("One's point of view is necessarily subjective not objective and is derived from one's socio-cultural context.").

⁶⁸ *Id.* Walker points out that both the transformative and narrative models adopt techniques of psychotherapy in resolving disputes.

⁶⁹ *Id.* at 71.

2. Stages of Mediation

a. Civil and Commercial Mediation

Walker begins his review of the stages of mediation by exploring a typical civil or commercial mediation. On the day of mediation, the clients and lawyers should, of course, arrive early and should not make initial contact with the mediator in order to avoid the impression of bias.⁷⁰ Once all the parties are in their respective rooms, the mediator will meet with each party individually and ensure that everyone signs the mediation agreement.⁷¹ After the preliminary individual meetings, the parties and the mediator will commence a joint opening session.⁷² The joint opening session allows the mediator to make any necessary introductions, establish the ground rules for the mediation, and give the parties an opportunity to make an opening statement.⁷³ The mediator will then open up the session to party statements. Walker notes that the claimant customarily makes the first statement.⁷⁴ Walker points out that there are both advantages and disadvantages to having a client speak for him or herself. On the positive side, the client has an opportunity to personally address the other side and express the client's views, which would not happen in litigation. On the negative side, the client may become emotional or make an ill-advised remark.⁷⁵ Regardless of whether the client personally speaks, the attorney should make a brief statement, ideally shorter than 10 minutes.⁷⁶ The statement does not so much sell the client's case as it explains the client's position.⁷⁷ Walker writes that some commentators recommend an impassioned presentation, but Walker argues against such an approach because it reflects aggression and anger and can be counterproductive to future negotiations.⁷⁸ Walker strongly recommends agreeing to a joint opening session, but he acknowledges that, in some circumstances, a joint opening session can be inadvisable, such as when party relations are significantly impaired or when the case involves embarrassing facts (such as a sexual harassment dispute).⁷⁹

⁷⁰ *Id.* at 182.

⁷¹ WALKER, *supra* note 1, at 183-84.

⁷² *Id.* at 184.

⁷³ *Id.* at 184-85.

⁷⁴ *Id.* at 186.

⁷⁵ WALKER, *supra* note 1, at 186-87.

⁷⁶ *Id.* at 188.

⁷⁷ *Id.* at 189.

⁷⁸ *Id.* at 189-90.

⁷⁹ *Id.* at 191.

After the joint opening session, the mediator will shuttle back and forth between the parties in private sessions, which often start longer and become shorter as the parties progress toward settlement.⁸⁰ Mediators generally try to have the parties make an initial exchange of offers before lunch, then subsequent offers after lunch, assuming that the parties work while they eat.⁸¹ Walker notes that by mid-afternoon, parties often begin to hit a “wall” and feel that the other side is not being reasonable or that the negotiations are a waste of time.⁸² When this happens, successful mediators often use review sessions to get the parties back on track.⁸³ The review session may happen jointly or individually, but in either case, the mediator attempts to review how far the parties have come to that point, what is impeding progress, and what needs to be done to move forward.⁸⁴ If the review session is successful, the parties will continue to exchange offers until one of the parties makes an offer the other can accept, and the parties agree to a settlement.⁸⁵ Walker cautions that drafting the settlement agreement is often a dangerous stage where one party may begin to have regrets.⁸⁶

b. Family Mediation

In England and Wales, parties who want to petition the court for resolution of finances or custody in divorce proceedings must undergo mediation first.⁸⁷ The mediation sessions generally last up to two hours, and the mediator will typically schedule three to five sessions.⁸⁸ Similar to civil and commercial mediations, the mediator compiles a list of issues and tries to achieve incremental agreement between the parties.⁸⁹ During family mediation, the parties usually do not have lawyers present unless necessary to address a misunderstanding between counsel.⁹⁰ However, the agreement between the parties—

⁸⁰ WALKER, *supra* note 1, at 192.

⁸¹ *Id.* at 192-93. Walker writes that some mediators “advertise the fact that their cases settle after two exchanges. After the second exchange a significant change often takes place in both rooms. They either decide that they want to try and settle today or that they do not.”

⁸² *Id.* at 194.

⁸³ *Id.*

⁸⁴ *Id.* at 194-95.

⁸⁵ WALKER, *supra* note 1, at 195-96.

⁸⁶ *Id.* at 196 (“There is always a danger that one party is feeling that they have given away too much. Frustration with each other may still be high. There might be displays of bad temper or sarcasm, which can upset everything.”).

⁸⁷ *Id.* at 196-97.

⁸⁸ *Id.* at 197.

⁸⁹ *Id.*

⁹⁰ WALKER, *supra* note 1, at 198.

memorialized in a Memorandum of Understanding—is not signed until the parties have an opportunity to review the agreement with counsel.⁹¹

c. Workplace Mediation

Human resources departments often commission mediation for disputes between employees, which are held at the employer's premises.⁹² The mediator meets with each employee twice before convening a joint session.⁹³ In the first individual session, the mediator listens to each employee's version and perspective of the dispute, while in the second session, the mediator attempts to have the employee see the dispute from the other party's perspective.⁹⁴ The joint session does not result in a written agreement but allows the employees to talk with one another, give explanations or offer apologies, and determine a workable solution for the future.⁹⁵

d. Community Mediation

Community mediation tends to follow the procedure of workplace mediation, except that the dispute arises between neighbors rather than co-employees.⁹⁶ Typically, the mediator meets individually with the neighbors in two private sessions to draw out the underlying grievances.⁹⁷ During the second private session, the parties will exchange offers through the mediator.⁹⁸ If the parties agree to hold a joint session, it often happens at a later time due to time constraints.⁹⁹

I like Walker's decision to provide a glimpse into how a typical mediation proceeds and a general survey of common mediation models. For a lawyer unfamiliar with mediation, Walker's examples should eliminate some of the uncertainty about how a mediation unfolds, which will continue to help a lawyer prepare physically and mentally.

⁹¹ *Id.* at 198.

⁹² *Id.*

⁹³ *Id.* at 199.

⁹⁴ *Id.*

⁹⁵ WALKER, *supra* note 1, at 199-200.

⁹⁶ *Id.* at 200.

⁹⁷ *Id.*

⁹⁸ *Id.* at 201.

⁹⁹ *Id.*

D. Navigate the Mediation: Mediation Agreements, Negotiation Techniques, and Settlement Agreements

1. Mediation Agreements

The next logical grouping of chapters in Walker's book concerns the actual mediation representation, starting with the agreement to mediate. Walker walks the reader through a standard mediation agreement while annotating the different sections. By giving readers an advance look at standard mediation agreement clauses, Walker seems to be guarding against what he claims is a common problem: people who do not review the mediation agreement before arriving at the mediation and, therefore, may not have a clear understanding of what they are signing.¹⁰⁰ Walker recommends that the clause identifying the parties include related and subsidiary companies for confidentiality purposes.¹⁰¹ Standard mediation agreements will outline the mediation procedure, which could include provisions for preparing and exchanging a case summary, procedures for providing mediation documents, and restrictions on who may attend the mediation.¹⁰²

The mediation agreement will then define the dispute between the parties.¹⁰³ Walker states that defining the dispute helps the parties focus on the discussion and attempt to settle, while also helping to prevent future disputes in the absence of a settlement or a full settlement or if additional matters lead to future litigation.¹⁰⁴ The standard agreement provides specific details about when and where the mediation will take place, how long the mediation will last, and what happens if the parties leave some offers on the table.¹⁰⁵ The agreement will also identify the chosen mediator and limit the liability of the mediator.¹⁰⁶ The third main section of the agreement will likely address mediation fees and expenses and will state whether the parties will share in the costs.¹⁰⁷

¹⁰⁰ WALKER, *supra* note 1, at 243.

¹⁰¹ *Id.* at 244.

¹⁰² WALKER, *supra* note 1, at 245-46.

¹⁰³ *Id.* at 246.

¹⁰⁴ *Id.* Walker writes that confidentiality provisions also make a definition of the dispute important. "It is not unknown for a party to allege after the mediation that some sort of an admission was made, which was not covered by the without-prejudice or confidentiality provisions of the mediation agreement because what was being discussed is not what is now being litigated." Walker notes, however, that, in practice, parties rarely contest the definition of the dispute.

¹⁰⁵ *Id.* at 247.

¹⁰⁶ *Id.* at 249 (stating that, although mediators limit their liability in different ways, they typically include a provision absolving them of liability for loss, whether in contract or tort, unless the mediator exhibits "gross error or misconduct").

¹⁰⁷ WALKER, *supra* note 1, at 250-52 (noting that, in the competitive mediation market, it is often possible to have an allotment for expenses included in the day rate for the mediation fee).

The standard agreement will also include a section of provisions related to legal representation, including whether parties are required to have legal representation and advising parties who are not represented to seek legal advice before, during, and after mediation.¹⁰⁸ Confidentiality will occupy several provisions, including provisions preventing the mediator from being called as a witness and protecting mediation documents from disclosure.¹⁰⁹ Finally, a mediation agreement will define the conditions for terminating the mediation.¹¹⁰

2. Negotiation Techniques

Walker identifies six principles of influencing others: reciprocity, commitment and consistency, social proof, liking, authority, and scarcity.¹¹¹ Reciprocity describes the practice of doing things for others to create a sense of obligation in the other person to do something for you.¹¹² “Commitment and consistency” is the tendency of someone to act in furtherance of an earlier stance or position taken, which may make it more difficult to negotiate a settlement depending on the initial positions on the parties.¹¹³ Social proof is synonymous with the herd instinct, in which people tend to look to others when deciding how or when to act.¹¹⁴ Walker notes that, although the herd instinct is natural, social proof can lead to groupthink, which attorneys must always guard against.¹¹⁵ The liking principle states that we tend to agree with others more often when we like them.¹¹⁶ Regarding the authority principle, Walker advises that both clients and attorneys listen to expert advice with respect and even more skepticism.¹¹⁷ Walker suggests that experts are susceptible to the same biases as anyone else, but they offer the additional wrinkle of

¹⁰⁸ *Id.* at 253.

¹⁰⁹ *Id.* at 254.

¹¹⁰ *Id.* at 256.

¹¹¹ WALKER, *supra* note 1, at 288-98. *See also* Melissa L. Nelken, *The Myth of the Gladiator and Law Students’ Negotiation Styles*, 7 CARDOZO J. CONFLICT RESOL. 1, 4-6 (2005) (identifying five styles of negotiation: competing, collaborating, compromising, avoiding, and accommodating).

¹¹² WALKER, *supra* note 1, at 288-89 (stating that reciprocity is one of the drivers of settlement negotiation, counteracting the impression that one party is making all of the concessions).

¹¹³ *Id.* at 289-90.

¹¹⁴ *Id.* at 290.

¹¹⁵ *Id.* at 291.

¹¹⁶ *Id.* at 291-93. Walker states that the liking principle has four off-shoots: similarity (where people are drawn to people similar to them), flattery, contact and cooperation (where people have a better opinion of others when they have been in contact with them and when they all have cooperated on some joint venture), and conditioning and association (where we tend to associate problems and situations with the people involved in them).

¹¹⁷ WALKER, *supra* note 1, at 295.

looking at every problem through the prism of their own expertise, which may not be the best way of assessing a problem.¹¹⁸ The scarcity principle holds that people place higher value on things with limited availability than on things readily available.¹¹⁹ In mediation, this manifests as clients who may desire something they possess even more when they think they are at risk of losing it.¹²⁰

Walker also contrasts two theories of negotiation: positional negotiation and principled negotiation.¹²¹ Walker suggests that positional negotiation is the theory that most people instinctively adopt and involves each side becoming entrenched in their own position and simultaneously attacking the other side's position and defending its own.¹²² By contrast, principled negotiation takes a more thoughtful approach and focuses less on one's own position and more on reaching an agreement.¹²³ The principled approach achieves this result by separating the people from the problem, focusing on interests and not positions, inventing options for mutual gain, and insisting on using objective criteria.¹²⁴

3. Settlement Agreements

Once the parties have successfully negotiated a settlement, they must sign a settlement agreement to ensure the agreement is legally binding.¹²⁵ Walker suggests that the time between when the deal is struck and when the settlement agreement is signed is a "danger zone," as clients will either want to celebrate the deal and will pressure the attorney to quickly draft the settlement agreement or the client will perform a "post-mortem" and question the previously agreed upon deal.¹²⁶ Walker writes that although an ideal scenario has the parties signing the fully drafted settlement agreement before parting ways, that often cannot be achieved.¹²⁷ Walker discusses a type of bridge document known as "heads of agreement."¹²⁸

¹¹⁸ *Id.* at 294 ("As has been said many times, if one only has a hammer then every problem looks like a nail.").

¹¹⁹ *Id.* at 296.

¹²⁰ *Id.*

¹²¹ See WALKER, *supra* note 1, at 298-300.

¹²² *Id.* at 298-99.

¹²³ *Id.* at 299-300.

¹²⁴ *Id.* at 300.

¹²⁵ *Id.* at 259.

¹²⁶ WALKER, *supra* note 1, at 259.

¹²⁷ *Id.* at 261 (noting that the two most common reasons are a lack of time and a lack of energy).

¹²⁸ *Id.* Walker states that the "essential question is whether [the heads of agreement] are intended to be legally binding or not." Heads of agreement, to be legally binding, "must be clearer and fuller than if they

Strangely, Walker's chapter on settlement agreements hardly discusses such agreements. Instead, he devotes a majority of the chapter to heads of agreements and includes a "checklist" for settlement agreements as an appendix at the end of the chapter.¹²⁹ The settlement agreement checklist includes provisions similar to the mediation agreement.¹³⁰ The checklist prompts attorneys to consider who should be party to the agreement and the scope of the claims being settled, warranties and payment arrangements, whether the settlement is conditional or unconditional, legal costs, confidentiality, and tax implications of the settlement.¹³¹ I think this chapter would be more helpful if Walker provided a sample hypothetical settlement agreement and explained the provisions, similar to the mediation agreement chapter.¹³² However, perhaps Walker chose not to take that route because there are not "standard" settlement agreements the way mediation agreements can be standardized.

Apart from the settlement chapter and the continued organizational issues, though, Walker again gives his reader a firm grounding in practical mediation representation. I thought his chapter about negotiation techniques was especially useful because he teaches the reader about the different psychological elements involved in negotiation. His advice is in the form of gambits or moves the attorney can attempt during negotiation.

E. After Mediation

1. When the Parties Have Not Settled

Not reaching a settlement can happen for a variety of reasons. For instance, the parties could be close to a settlement but not quite there, or they could still be far apart.¹³³ One of the parties could have walked away early because of an unwelcome surprise or frustration over the other side's tactics.¹³⁴ Alternatively, it is possible one of the parties simply had a train or a plane to catch and did not have sufficient time to reach the settlement.¹³⁵ Although commentators argue that mediation, even without a settlement, should be considered a success because it reopens the channels of communication, Walker suggests that, in practice, parties who leave mediation without a settlement will

are not," must be "capable of having legal effect," and must include "all the usual formalities and ingredients for a legally binding contract."

¹²⁹ *Id.* at 267-71.

¹³⁰ *See* WALKER, *supra* note 1, at 267-71.

¹³¹ *Id.*

¹³² *See Id.* at 243-56.

¹³³ *Id.* at 273.

¹³⁴ *Id.*

¹³⁵ WALKER, *supra* note 1, at 273-74.

feel disappointed and will often think the mediation failed.¹³⁶ Attorneys must be cautious not to allow the lack of a settlement during mediation to become an impediment to secure a settlement after mediation ends.¹³⁷ The most common way to keep the negotiation door open is to leave offers on the table.¹³⁸ The primary consideration is whether further discussions will be carried out in the same manner as the mediation, especially regarding confidentiality and the fact that a settlement is not legally binding until all parties sign the settlement agreement.¹³⁹

2. *When the Parties Have Settled*

If the parties succeed in reaching settlement during mediation, they must notify the court if they had already commenced proceedings.¹⁴⁰ Walker suggests that parties, and lawyers, can often experience post-settlement blues resulting from the sudden drop in tension and anxiety.¹⁴¹ Walker recommends that lawyers send a letter to their clients—a congratulatory letter if the client was satisfied with the settlement and an understanding letter if the client was less satisfied—and summarize the reasons why the client decided to settle.¹⁴²

3. *Three Scenarios to Avoid*

Walker cautions lawyers to avoid three types of scenarios following settlement. The first, settler's remorse, occurs when the client has time to reflect on what he or she gave up in the excitement of the moment.¹⁴³ The letters that Walker recommends after a settlement seek to smooth over any remorse by reminding the client why he or she

¹³⁶ *Id.* at 274.

¹³⁷ *Id.*

¹³⁸ Walker writes that leaving an offer on the table requires care. WALKER, *supra* note 1, at 275. The offer should:

be in writing and signed by the client as well as the representative; stipulate exactly what it is . . . ; stipulate the time for acceptance; stipulate the method of acceptance, which is usually by email to the offeror's solicitors; and stipulate how the proceedings are to be disposed of, in cases where proceedings have been started.

Id.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 277.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ WALKER, *supra* note 1, at 277.

decided on settlement.¹⁴⁴ The second scenario to avoid is the client's non-compliance with the settlement agreement.¹⁴⁵ The final scenario to avoid, quite obviously, is being sued by the client.¹⁴⁶ Walker notes that the most common reasons why an attorney would be sued is a failure to fully explain the settlement agreement or its financial implications, failure to fully counsel the client on the appropriate time to mediate, or failure to explain the consequences of not mediating.¹⁴⁷

IV. CONCLUSION

In *Mediation Advocacy: Representing Clients in Mediation*, Walker offers his readers a wealth of practical information and tips that represents his extensive experience mediating disputes. Throughout the book, Walker blends the ideas of mediation commentators and academics with his own practical experiences. Although readers outside of England and Wales may be frustrated by his insistence in trying to root the book in a specific region, much of his advice likely transcends national borders. Regardless of where a mediation takes place, attorneys must have the right mindset, must help their clients know what they want, must accurately conduct a risk and benefit assessment, must be aware of the kinds of techniques mediators will use, and must be effective negotiators. In that regard, Walker's decision to ground his book in the law of England and Wales may not make much difference for readers in other parts of the world.

What Walker clearly possesses in experience and knowledge, however, he seems to lack in organizational discipline. Walker appears to want his book to be both a practical guide and a general discussion of mediation. Although some general discussion of mediation is useful, Walker includes more than necessary, resulting in a book that tends to drag and leave readers impatient. Readers must wade through nearly one-third of the book before getting to any material that is truly practical, which seems odd for a practice-oriented book. Walker also shifts focus from clients to attorneys to mediators frequently, as though he hoped that all three would read this book to learn about mediation. I appreciate that endeavor, but it makes the book feel disjointed. The book's overarching theme—indeed, even its title—points to a lawyer-centered focus: representing clients in mediation. With this focus, it seems unusual that Walker would also choose to include a chapter discussing what “type” of mediator the reader is, or a lengthy section about how to choose which lawyer to represent a client in mediation. The result is a mashup of ideas about mediation that, while containing a treasure trove of advice, leaves the reader feeling somewhat cluttered and frustrated. Walker could have eliminated up to a quarter of the book or more, tightening the book's theme and giving the reader a more useful, step-by-step guide to preparing for and navigating a mediation.

Nevertheless, the flaws in Walker's book, while often frustrating, do not take away the wealth of knowledge and advice that Walker imparts. Any practitioner

¹⁴⁴ *Id.* at 278.

¹⁴⁵ WALKER, *supra* note 1, at 278-80.

¹⁴⁶ *Id.* at 280.

¹⁴⁷ *Id.* at 280-81.

interested in learning about the fundamentals of mediation, from preparation and establishing the right mindset, to practical advice about what to include in the mediation file and how to handle a mediation that does not result in settlement, will find a valuable reference in Walker's book. In fact, I suspect the organizational problems in the book are directly traceable to Walker's significant knowledge and wisdom in the world of mediation. The book is not perfect, but it gives any practicing lawyer facing potential mediation a firm footing for effective representation.