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**Product Liability and Complex Torts
Charlotte Regional Seminar**

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The Art of Mediation

Presenter: Joseph M. Moore

A light blue world map is visible in the background of the right side of the slide, showing the outlines of continents.

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1. Two Basic Types of Mediation
2. Why Mediate?
3. When?
4. Choosing the Mediator
5. Preparing the Opening Statement & Mediation Strategy
6. Demands/Offers
7. Settlement Reached – Now What?



Two Basic Types of Mediation

A. Court Ordered Settlement Conference

- i. State
- ii. Federal

B. Private Mediation

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A. COURT-ORDERED SETTLEMENT CONFERENCE

i. State

- Some states have court-ordered judicial settlement conferences
- Mediator is a former judge selected from a list provided by the state
- Judges receive a nominal fee for conducting these settlement conferences
- Not necessarily any incentive for them to settle the case

A. COURT-ORDERED SETTLEMENT CONFERENCE

ii. FEDERAL

- Totally different animal from state
- Magistrate Judge assigned by the District Judge to handle the settlement conference
- Time is usually limited depending on the judge's docket (3-4 hrs max)
- Opening presentations are usually limited in time and substance, sometimes none at all
- Magistrate Judge is motivated to settle the case so it can be removed from the District Judge's docket
- The "black robe" effect
- More heavy handed than private or state

A. COURT-ORDERED SETTLEMENT CONFERENCE

ii. FEDERAL (continued)

- One of the most onerous burdens - requirement that parties be present – EDVA Order
- Some Orders in VA require “a business person” - someone outside of GC’s office to attend

In addition to counsel, **each party must have a representative physically present with the full authority to settle this action.** If a business entity (or entities) is/are involved, each entity must have a representative with full authority to settle the case on behalf of that entity physically present. The term “full authority” means the ability of the representative to resolve the case up to the value of the last demand by the Plaintiff. A defense representative can have full authority even if the representative does not expect or intend for the case to settle at the value of the last demand by the Plaintiff(s). **The failure of a party to have a representative physically present with full authority to settle the case may result in the imposition of sanctions upon that party.**

Mutual agreement of both parties to mediate

- No time pressure from mediator (who is being paid big \$\$/hour)
 - Nothing happens until after lunch
- Longer openings from mediator (to build credibility with the parties, especially Plaintiff) and lawyers
- Mediator less confrontational than federal judge
- Lack of “black robe” effect
- Can be just as effective as settlement conference because of length, flexibility



Why Mediate?



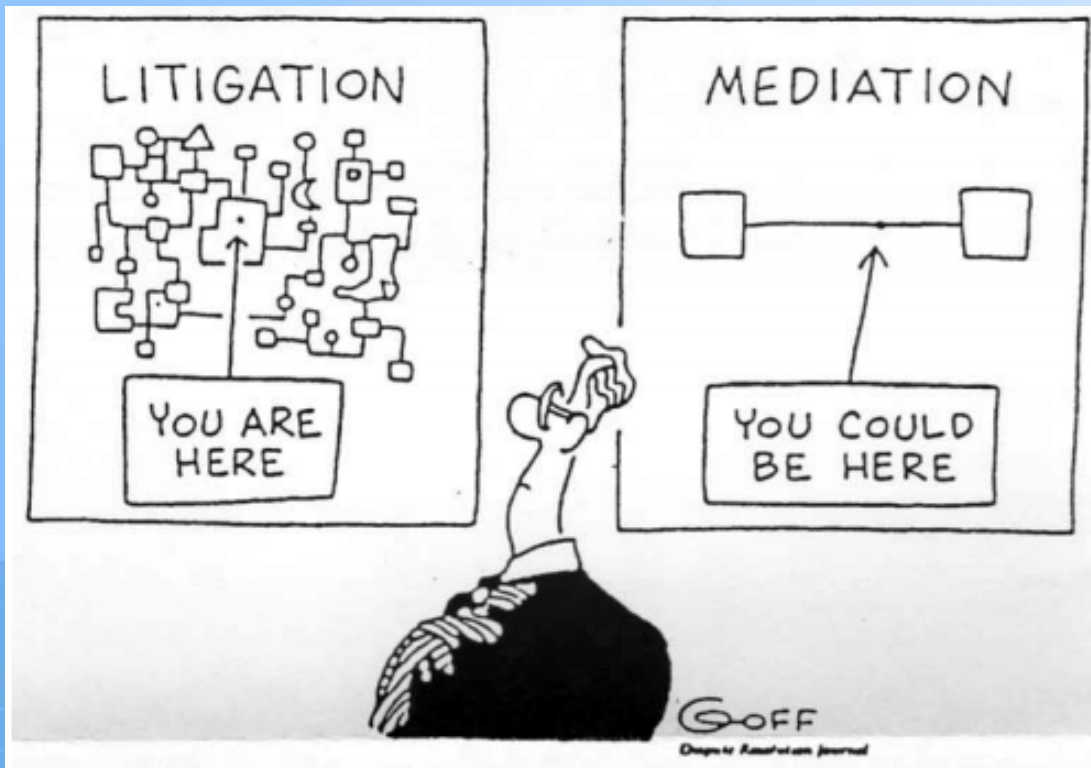
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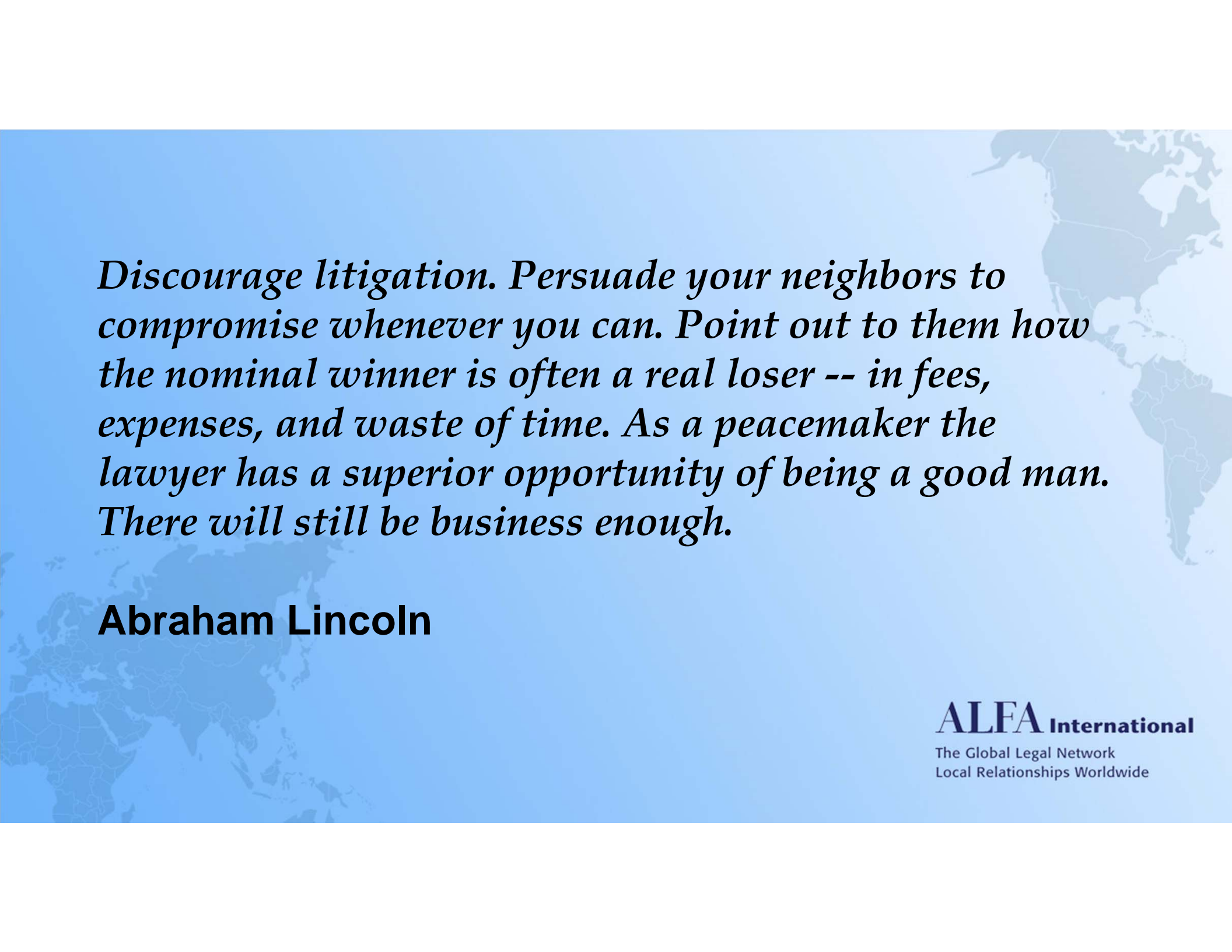
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2. WHY MEDIATE?

Removes risk for the client and places control of the resolution in the hands of those most knowledgeable about the case

- Takes it out of the hands of a jury of 7 people who will never know as much about the case as the lawyers, clients, and who generally don't want to be there
- Save on trial fees/expenses
- Even if case doesn't settle, good intel
- Confidentiality - what happens in Vegas, stays in Vegas



Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser -- in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.

Abraham Lincoln

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When to Mediate?



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3. WHEN TO MEDIATE?

A. Pre-Suit

- I. Removes risk of issues that may be raised in discovery
- II. Saves on fees/expenses
- III. Gather intelligence about Plaintiff's case
- IV. Set tone for discovery if case doesn't settle
- V. Strategy – hold back?

B. Prior to Experts

C. After Experts Designated

D. After Close of Discovery



Choosing the Mediator



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4. CHOOSING THE MEDIATOR

- Size of the case
- Nature of the case
- Relationship with Mediator
- Prior history – ask around
- Personality, Temperament



Jameson, the mediator, uses his last remaining negotiating tool in an effort to break the stalemate.

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Preparing the Opening Statement & Mediation Strategy



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5. OPENING STATEMENT & MEDIATION STRATEGY

- A. Meet with client/claims adjuster prior to mediation to discuss/develop strategy
- B. At mediation, audience is Plaintiff or representative of defendant
 - Provide perspective
- C. Tone is KEY to success
 - Talk to mediator beforehand to gauge whether opening needs to be confrontational or toned down
 - Remember – the goal is to get the case resolved for the best figure for your client, not to get in needless conflict with opposing counsel or Plaintiff



Demands/Offers



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Thanks to compromise they were moving closer.

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6. DEMANDS/OFFERS

- A. Standard tit for tat offers/demands
- B. Bracketing
- C. Mediator's Proposal
- D. Miscellaneous – gift cards?
 - Offer to pay for mediation to close the deal?
 - How about making an offer to contribute to a charity in Plaintiff's name (if wrongful death case, etc.)?



Case Settles. Now What?



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7. DEMANDS/OFFERS

- A. Memorandum of Settlement Terms and Conditions
- B. Release
- C. Dismissal
- D. Confidentiality
- E. Non-Disparagement Clause
- F. Timing of Check

DISCUSSION

- Road Blocks to a Successful Mediation:
 - Being unprepared
 - Client expectations
 - Pre-mediation conf call with mediator
 - Liens
 - Surprises
 - Ex. Last minute supplement to discovery from Plaintiff with new medicals, increase in bills
- What types of road blocks have you experienced?
- Any recent developments/changes in how you handle mediations?

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QUESTIONS?

Joseph M. Moore, Director

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