FOR BUSINESS DISPUTE SOLUTIONS, PROCESS MATTERS

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I. Introduction

Business mediation should be common sense, but it is all too often corrupted by nonsensical rules and practices. The ground rules that serve as a foundation for the mediation come from an antithetical adversary system, so the traditional mediation process has been adulterated with counterproductive adversarial practices. To consistently reach mutually beneficial mediated settlements, that are exponentially better than anything attainable through traditional mediation, both the structure of mediation ground rules and the practices utilized throughout the mediation process need to be changed and refocused on the ultimate purpose: *enabling business decision makers to address the underlying business interests in the business dispute*. This article will show how to transform business mediation structure and practice in accordance with this purpose—yielding unprecedented results.

II. Unconventional Ground-Rules

Formal mediation has taken on a variety of unique forms, but each iteration contains a curiously similar structure. Whether the mediation is facilitative, transformative, or evaluative, the initial ground rules are identical: parties and a mediator sit around a conference table.[1]

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[1] *See generally* Samuel J. Imperati, *Mediation Practice Models: The Intersection of Ethics and Stylistic Practices in Mediation*, 33 Willamette L. Rev. 703; Kenneth M. Roberts, *Mediat-*

Much greater academic emphasis is placed on how the mediator acts during the mediation rather than on the initial structuring of the mediation.[2] Structure plays an enormous role in framing the quality of communication, even before dialogue begins. The traditional structure of all-party, face-to-face mediation sessions is usually suboptimal. This model stunts communication and fails to address the underlying interests possessed by each party. A fundamental shift in mediation structure is the first required step to achieve a superior result.

A. Timeframe

1. Thirty Days of Percolation

Arbitrary deadlines and indefinite negotiation are both counterproductive in business mediation. They cause delay, force unnatural communication, and ultimately undermine the consensual resolution sought.[3] Business negotiation follows a natural progression—almost a ritualistic dance. Mediation structure should follow this progression. If the natural progression is harnessed, the parties will generally shake hands within a month.

Fewer than thirty days is inadequate for each stage of the natural progression (described below) to run its course. Each business entity acts through human beings who need, at each stage of the mediation,[4] to ingest, process, and percolate information before they become comfortable. Percolation is very different from stagnation. A mediation longer than thirty days, the time necessary for the ritualistic dance, loses momentum, stalls, and backfires. Parties begin to triple-guess, overanalyze, and stray.

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ing the Evaluative-Facilitative Debate: Why Both Parties are Wrong and a Proposal for Settlement, 39 LOY. U. CHI. L.J. 187 (2007).

[2] *See generally* David A. Hoffman, *Mediating Legal Disputes: Effective Strategies for Lawyers and Mediators*, 2 HARV. NEGOT. L. REV. 229 (1997); Diane J. Levin, *Ethics and Best Practices for Mediation Provider Organizations: 7 Years After Georgetown*, MEDIATE.COM, Nov. 2009, http://www.mediate.com/articles/LevinDbl20091116.cfm; Edward Brunet, *Symposium: Perspectives on Dispute Resolution in the Twenty-First Century: Judicial Mediation and Signaling*, 3 NEV. L.J. 232 (2002).

[3] *See generally* John Lande, *How Much Justice Can We Afford?: Defining the Courts' Roles and Deciding the Appropriate Number of Trials, Settlement Signals, and Other Elements Needed to Administer Justice*, 2006 J. DISP. RESOL. 213 (2006); Honorable Rodney S. Webb, *Court-Annexed "ADR"—A Dissent*, 70 N.D. L. REV. 229, 233 (1994).

[4] *See generally* David A. Hoffman, *Paradoxes of Mediation*, A.B.A. DISP. RESOL. MAG. (2002), *available at* http://www.iamed.org/pub_hoffman.cfm (articulating various ways that human beings must process occurrences during mediation).

It is impossible to reach an optimal settlement at any single mediation session. Marathon single-day mediation sessions oversimplify contentious issues, fatigue participants, force instantaneous decision-making, and produce inferior results that likely will be questioned in hindsight.[5] Many practitioners do not deny these effects of single mediation sessions, but consciously use them to bring about agreement.[6] This rushed and manipulated process is inferior because it fails to address underlying interests. If a resolution is reached, it will objectively and subjectively be suboptimal. Parties need time.

Mediation sessions can be analogized to relationships and social interactions, especially in terms of how the parties respond to each other and the process. It can be argued, especially by practitioners using single-day sessions, that a mediation is similar to a party in that mediation naturally comes alive at a certain point. Just as a party, in mediation, communication will be stilted at the beginning, but as participants begin to let their hair down and become comfortable, communication becomes less encumbered. While this is a valid point to a certain extent, participants do not frequently get married before the end of that same party. A major purpose of mediation, in addition to communication, is entering a long-term, sustainable agreement. It is far more beneficial to have a thirty day courting period—a series of several meaningful contacts—and allow the participants to "sleep on it" in order to allow them to adequately process what is happening.

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[5] John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 887 (1997); Richard M. Calkins, *Mediation: The Gentler Way*, 41 S.D. L. REV. 277, 281 (1996).

[6] Paul Fisher, *Avoiding Enforceability Problems of Mediation Settlement Agreements*, FISHER MEDIATION (2008), *available at* http://www.fishermediation.com/library_avoiding_problems.php ("Though I always respect counsels' request to end the mediation due to fatigue, counsel should also consider General George Patton's warning: it is better to have a good plan today than a perfect plan tomorrow."); Michael D. Young, *Alternative Dispute Resolution: Tips for Enforcing Mediated Settlements*, DAILY J., *available at* http://www.dailyjournal.com/cle.cfm?show=CLEDisplayArticle&qVersionID=111&eid=782846&evid=1 (last visited Jan. 25, 2010). Young notes:

> As experienced mediators and attorneys know well, the momentum gained from a full day of difficult negotiations—combined with fatigue, hunger, and often a locked restroom door—all can help create the dynamics necessary to bring some disputing parties to a resolution. It is then that the settlement agreement must be drafted and signed, before 'settlor's remorse' can creep in. The risk of losing a settlement explodes exponentially if the parties leave the mediation room without a signed document in hand.

Id.

2. Natural Progression

This natural progression contains four distinct phases. An effective mediator expects these phases in order and allows just enough time per phase. All four phases of this natural progression combined should take under thirty days; otherwise this natural momentum will be lost.

Phase one focuses on outside counsel. This issue requires extreme sensitivity, in part because direct private access to the parties is essential during the process.[7] Lawyers can be conservative and possessive by nature, so unsurprisingly, they can be uncomfortable with the mediator communicating directly with their clients.[8] Also, lawyers have a direct conflict of interest because a successful mediation eliminates litigation fees—lawyers are paid to protect their client during conflict.[9] Moreover, business clients may wish to defer to their "hired guns."

Mediation typically comes after years of litigation, when the business leader has been removed from the process. When the mediator attempts to bring them back into the process, the business leader begins to feel empowered and positive about the future. The mediator must recognize the value that the lawyers have contributed to the process (i.e., zealous advocacy, the reputation their firm brings to this case, etc.). Once the client supports the mediation and outside counsel feels respected, direct access follows. Then, the mediator should, in an engagement letter, provide for allowing the mediator to speak with the client directly.

Phase two focuses on the mediator establishing rapport with each of the parties. The mediator should have at least one in-person meeting with each player. The setting for such an interaction should not be strictly business-related.[10] It is best to have this initial meeting while engaging in an external activity that the party enjoys, in order to lay a firm foundation of camaraderie and to build a relationship. Thereafter, the mediator should grow the relationship through telephone communications. If they have not met face-to-face, initiating a relationship by telephone is possible but more difficult.

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[7] *See infra* Part III.A.

[8] *See generally* Jean Poitras, Arnaud Stimec & Jean-Francois Roberge, *The Negative Impact of Attorneys on Mediation Outcomes: A Myth or a Reality?*, 26 HARV. NEGOT. J. 9 (2010).

[9] *See* Trevor C. W. Farrow, *The Negotiator-as-Professional: Understanding the Competing Interests of a Representative Negotiator*, 7 PEPP. DISP. RESOL. L.J. 373 (2007).

[10] *See infra* Part III.D.

Phase three builds exponentially on the groundwork laid in phase two: gaining the parties' trust. Of course, the mediator must examine all pleadings and related information in the litigation.[11] These documents will not provide the answer—they are advocacy pieces that inherently demonstrate positions rather than interests—but familiarity with all aspects of the case builds the mediator's credibility in the eyes of the players.

Constant contact with the players, as well as always exploring their true interests and potential options for resolution, also increases trust. *Every day*, the mediator must communicate with the players, even if only a five-minute phone call. This repetition enables the mediator to gain a clearer picture of what the underlying interests are—precisely the kind of information that is critical, theretofore buried, and not previously adequately articulated. This takes time. Once these interests are known, the mediator continues to increase trust by suggesting potential integrative solutions and by stimulating creative responses. This evolving dynamic makes settlement music.

Dispute resolution, at its best, comes from the parties through prodding from the mediator; the best solutions come from within. During the final phase, the parties need to make an emotional investment in this process, which requires that they see the true commitment of the mediator. As the parties see the mediator's unrelenting effort, they become more confident that the mediation will succeed. Even the "unsuccessful" potential solutions raised by the mediator have succeeded if they shift perceptions of the conflict from a legal issue to a business issue that calls for commonsense business solutions. The pendulum swings from protectiveness to mediation buy-in, and even further to stimulation of creative business solutions.

B. Permanent Caucus: No Joint Sessions

Traditional mediation primarily uses joint sessions.[12] Debate rages whether caucusing should be used—usually on a scale from

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11 *See* Igor Ellyn & Evelyn Perez Youssoufian, *Litigating in the Enlightened Age of Mediation in Ontario, Canada: Drafting Pleadings*, Nov. 2009, *available at* http://www.hg.org/article.asp?id=7844 (last visited Jan. 24, 2010) (arguing that initial pleadings should be structured carefully because they will likely eventually be read by mediators).

12 *See* Laurie Israel, *To Caucus or Not to Caucus—That is the Question*, MEDIATE.COM, Jan. 2010, http://www.mediate.com/articles/israelL13.cfm.

sparingly to *never*.[13] Mediation should usually be conducted outside of the presence of the opposing party: no joint sessions—only a permanent caucus.[14] This ensures that information is utilized to best lead to an optimal settlement. Information should be filtered through the mediator to keep the playing field *unequal*. While this may seem counterintuitive, an uneven playing field is critical to maintaining momentum and ultimately reaching resolution. The group mentality superficially prizes the uninhibited flow of information between parties. It inevitably results in less overall information being released. Human nature causes parties to be skeptical and guarded when conversing with the enemy. This makes people clam up. That reduces information, and information is key. Less information means the elimination of potential bargaining zones.

The "divide and conquer" three-dimensional mentality is far superior to adversarial, two-dimensional business mediation. The experienced neutral can recognize bargaining zones by comparing each party's true underlying interests and positions. The neutral then is in a unique position of being able to leverage differences in interests between the parties in order to reach not only a mutually-beneficial settlement, but an optimal settlement. Once an interest, or lack of interest, is admitted during a group session, *everyone* knows the information and it can no longer be used to create a bargaining zone. However, if it is disclosed only to the mediator, just as the other party discloses to the mediator an interest or lack of interest in another area, the mediator can then relatively easily facilitate an exchange of reciprocal benefit for both parties. In sum, differences in interests are extremely valuable and should be leveraged rather than minimized and indiscriminately disclosed in a group setting.

Also, as a general principle, it is usually much "easier to negotiate on behalf of someone else" than to negotiate on your own behalf, particularly due to the emotional component inherent within negotiation.[15] Parties often take actions by the other party

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[13] *See generally* Colleen M. Hanycz, *Through the Looking Glass: Mediator Conceptions of Philosophy Process and Power*, 42 ALBERTA L. REV. 819 (2005) (arguing that even if a caucus is used, a mediator should attempt to return to joint session as soon as possible).

[14] *See* Richard Calkins, *Caucus Mediation—Putting Conciliation Back Into the Process: The Peacemaking Approach to Resolution, Peace, and Healing*, 54 DRAKE L. REV. 259 (2006) (describing caucus mediation, taking great pains to defend such practices).

[15] Irene Marshall, *Tips From a Former Recruiter on How to Negotiate Salaries*, TOOLS FOR TRANSITION, *available at* http://www.toolsfortransition.com/download/Article-Salary-Negotiations.pdf (last visited Jan. 25, 2010).

personally. The negative emotions associated with this can cause difficulty when attempting to negotiate themselves. If the information is given to the mediator, to whom positive emotions are associated, the mediator can more effectively use this information when negotiating with the opposing party.

C. Collaborative Framework: No Combative Written Submissions

The framework established at the outset of the mediation, within which communication will take place, shapes the tenor of such communications for the duration of the mediation. Mediation briefs are advocacy pieces, which by their very nature do not tell the whole story. Even basic facts and issue statements reflect only one side of the situation. Moreover, the act of preparing such a brief begins the process of statement-making, rather than question-asking. This sets a combative tone rather than a collaborative tone, which prematurely cements positions. Therefore, no written submissions should be requested or even read by the mediator. In fact, the mediator should preemptively address this issue by prohibiting such submissions. The exclusive focus should be internal searching and becoming comfortable with expressing the fundamental underlying interests they possess.

Having no written submissions means that no paper trail is created. The absence of a paper trail should provide each party, and their respective attorneys, an added level of comfort to communicate freely. All communication with the mediator should be held in strict confidence, regardless of whether it is written.[16] The fact that this framework only permits verbal communication gives the parties added confidence to communicate freely. There is no written evidence if they admit something that may be contrary to their interest for litigation purposes.

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16 Susan Nauss Exon, *California's Opportunity to Create Historical Precedent Regarding a Mediated Settlement Agreement's Effect on Mediation Confidentiality and Arbitrability*, 5 PEPP. DISP. RESOL. L.J. 215, 216 (2005); *contra* L. Randolph Lowry & Peter Robinson, *Mediation Confidential: In Three Recent Cases, Courts Have Carved Out Exceptions to the Rule of Strict Secrecy in Mediation Proceedings*, 24 L.A. LAW. 28 (2001) (articulating three instances where courts have ruled mediation communications not confidential).

D. Stand-Alone Endeavor: Litigation Continues

A concern for parties considering mediation is to avoid any action that could be interpreted by the opposing party as showing weakness;[17] they are currently at war and do not want to blink in the face of their opposition. If litigation, arbitration, or any other adjudicative practices need to be on hold, a request (or even a suggestion) for mediation could be interpreted as a sign of weakness. Therefore, business mediation should be a stand-alone, separate endeavor that runs concurrently with other litigation that has already been instituted. This will permit a party agreeing to mediation to have a scapegoat—"Why not give the mediator a shot? If it doesn't work, I will still teach my opponent a lesson in court."

When the mediator discusses the possibility of mediating with the first party, the mediator should request that the party not tell the mediator if the party desires to enter mediation, just if it is possible that they may consider mediation if the other party does so as well. Then the mediator can approach the other party and honestly say "I don't know if the other party really wants to do this, but I am convinced that we can settle this thing, and if you give me a chance, perhaps I can convince the other party as well." This way, neither party looks weak or is figuratively caught with their pants down if they agree to mediate.

Other disguised benefits of continuing litigation are the expense, risk, and delay. For the parties engaged in mediation, these perils provide added incentive to prefer mediation and shift their mindset to the fourth stage of the mediation process. This does not contradict a commonly-held benefit of mediation: reducing litigation expenses.[18] It is directly in line with this principle. The added legal costs that provide incentive to settle during the thirty day mediation process, coupled with the mediation success fee, will still be greatly less than if mediation were not utilized and litigation continued unabated.[19]

The time at which the mediator joins the matter is quite important. Litigation, appropriately or inappropriately, is often used as an opportunity to beat one's chest and manifest a desire to retal-

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17 Roselle L. Wissler, *Barriers to Attorneys' Discussion and Use of ADR*, 19 OHIO ST. J. ON DISP. RESOL. 459, 463 (2004).

18 *See generally* Craig A. McEwen, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation*, 14 OHIO ST. J. ON DISP. RESOL. 1 (1998).

19 *See infra* Part IV.

iate against a perceived wrongdoer. These feelings may need to be fully aired before a person is willing to discuss settlement in a calm, level-headed manner.[20] In long-pending litigation, when the honeymoon phase of litigation is over, the war tendency dissipates, and deal fatigue sets in, then the mediation ground becomes fertile for settlement. Also, the fact that the litigation continues will help remind the parties of their disenchantment with the litigation process throughout the mediation.

E. Voluntary: Quit at Any Time

Mediation by definition is non-binding; the third-party neutral cannot force anyone to do anything.[21] Unless parties are litigating a dispute arising under a contract containing a "good faith attempt at mediation" clause, this should also apply to engaging in a mediation process. Locking parties into a process is not sensible if they do not want to be there.[22] Parties should know that if they lose trust in the mediator or in the process at any time, then they can immediately discontinue participation. It becomes much easier to convince the parties to engage in the process at the onset if they know that they are always free to change their minds. Both sides know there is never any wasted time related to one party continuing to engage while the other party drags its feet.

III. Unadulterated Procedure

The actions taken by the mediator during mediation complement and exponentially enhance the ground rules for the mediation process. They are synergistic. Strangely, many practices espoused by business mediation professionals are actually counterproductive. The following procedural aspects of the mediation process are vital to obtaining an optimal outcome.

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20 Richard M. Calkins, *Caucus Mediation—Putting Conciliation Back into the Process: The Peacemaking Approach to Resolution, Peace, and Healing*, 54 Drake L. Rev. 259, 279 (2006).

21 Maureen A. Weston, *Confidentiality's Constitutionality: The Incursion on Judicial Powers to Regulate Party Conduct in Court-Connected Mediation*, 8 Harv. Negot. L. Rev. 29, 31 n.5 (2003).

22 *See generally* Dr. Iur Ulrich Boettger, *Efficiency Versus Party Empowerment—Against A Good-Faith Requirement In Mandatory Mediation*, 23 Rev. Litig. 1 (2004) (describing good-faith mediation requirements).

A. Deal Directly with Business Leaders

All parties involved, including the mediator, should view the matter as a *business* dispute—not as a *legal* dispute. Business disputes require business solutions, not legal solutions. The best parties to provide those business solutions are not their hired attorneys but rather the business leaders. Hence, the mediator should deal directly with the business leaders, including dealing with them outside the presence of their lawyers.[23]

All business professionals are not of equal value in the conflict resolution process. The key is for the mediator to deal directly with the *decision-maker* outside the realm of influence of all subordinates, regardless of the origin of the conflict. Litigation focuses on how the conflict occurred in the past; however, mediation focuses on how the conflict can be resolved in the future.[24] Subordinates with a role in conflict resolution negotiations may resist mutually-beneficial solutions because they lack authority to bind—they will say "no" because they lack the authority to say "yes." Therefore, the person with the authority to decide, rather than the person instrumental in starting the matter, is the one with whom the mediator ultimately should conduct conflict resolution discussions.

However, all subordinates should not be ignored entirely. In fact, the mediator should converse thoroughly with subordinates to gather information before the mediator brings potential solutions to the business decision-maker. Because the decision-maker's time is invaluable, it would be disrespectful to start with the decision maker before conducting due diligence with the subordinates. Also, gathering information from the subordinates provides other benefits to the decision maker's business interests. Business leaders want valuable intelligence regarding their staff.[25] When a neutral mediator brings the gathered information and potential solutions directly to the business leader, the neutral should convey helpful insight learned from employees to the business leader. The decision-maker will appreciate this—consciously and subconsciously. This subtle sweet spot helps settling cases, and such psychological sensitivity is critical.

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23 *See supra* Part II.A.2.

24 Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: "The Problem" in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863, 884 (2008).

25 *See generally* HARVARD BUSINESS REVIEW ON FINDING AND KEEPING THE BEST PEOPLE (Harvard Bus. Press 2001).

B. Address Underlying Business Interests

Lawyers think that parties' interests are legal interests because lawyers have been trained to think of legal positions within the legal process and to create issues. These positions, processes, and issues are symptoms that arise from underlying business issues. For example, a client's claim of interest in enforcement of a product placement contract is likely a legal symptom of an underlying business interest: increasing product publicity to bolster sales revenues. If the parties are pigeonholed into fighting over a single, specific product placement contract, then the mediation will either fail or achieve a suboptimal result. However, if everyone shifts his/her mindset to addressing the underlying business interests (i.e., increasing product publicity), there will be more ways to satisfy this desire while solutions become both easier and better.

To begin this process, the mediator should boldly ask a party what would be in his or her (selfish) best interest and assure him or her that all answers will be kept confidential.[26] A particularly effective question is, "If you had a magic wand to waive, what would be the perfect solution and why?" Beyond financial or property related issues, answers will include political issues, such as not wanting to appear incompetent to coworkers or not wanting to be blamed for a problem inherited from a predecessor. The mediator must be relentless in tactfully probing this area, taking no answer at face value. As each answer is fully explored, digging beneath the surface to find the underlying interest, like peeling an onion, this will likely uncover other previously overlooked, yet festering and important issues that are necessary to address.

In traditional business mediation, the vast majority of time is spent talking about things not truly at the heart of the conflict. Every minute spent discussing such non-issues is one step further in the wrong direction. This needlessly frustrates both parties and wastes valuable time, which is why correctly framing the issues at the outset of the mediation is so critical.[27] For example, if Person A has recently been promoted to equal stature as Person Z, after

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[26] *See* Steven L. Schwartz, *The Mediated Settlement: Is it Always Just About the Money? Rarely!*, INT'L ACAD. MEDIATORS (2005), *available at* http://www.iamed.org/Allabout.cfm (last visited Jan. 16, 2010) (arguing that money is a common surface-level interest that almost always represents a different underlying interest).

[27] Mariana Hernandez Crespo, *Building the Latin America We Want: Supplementing Representative Democracies with Consensus-Building*, 10 CARDOZO J. CONFLICT RESOL. 425, 457 (2009) (providing an example of correctly framing the issues in ADR and the importance related thereto).

previously being Person Z's subordinate, and they are now arguing about the appropriateness of Person A's marketing plans, the issue may be the new relationship dynamics between the people, rather than the actual marketing plans. Most topics are pretexts for underlying interests that are uncomfortable to address explicitly. Person A may want to be recognized and respected as an equal, or Person Z may feel threatened by sharing responsibilities with a former subordinate. Regardless of the particular underlying unspoken issue, every moment spent discussing the actual marketing plans is futile and counterproductive. The goal is to unearth the underlying issue.

Everyone reading this, including the authors, should pause and realize that we fail horrendously in this area, likely on a daily basis. It is all too easy to observe a situation and instantly assume that we know what motivates the involved parties. This may be due to several reasons: we have been trained in the particular area surrounding the situation and rest our assumptions upon our own education; we believe that we have keen people skills; logic mandates that people act for certain reasons; our gut-instinct is rarely wrong; or maybe we just subconsciously assume that other people act with the same motivations as we would if we were in the same situation. All of these reasons, along with every other reason imaginable, may contain aspects of validity but can lead us to incorrect conclusions. This section of this article has fallen into this trap. A previous example stated that a conflict surrounding a product placement contract likely was symptomatic of an underlying business interest in increasing product publicity. This makes sense. It is objectively logical. Nonetheless, it could be entirely inaccurate. Perhaps the person owning the product had an unexplainable affinity for the number two, and he is upset that his product will no longer appear on television at 2:22 p.m. This makes no sense. It is objectively illogical. People are emotional and have their own idiosyncrasies. If it is true, it is exactly the issue that needs to be further uncovered and addressed in order to bring a mutually beneficial resolution to this matter.

C. Stroke Genuinely

People have stress in their lives; many feel as though they have too much stress.[28] This also applies to everyone in the mediation: the parties, their lawyers, the mediator, etc. Who is more likely to stay in a dispute: someone stressed out or someone who feels as if they have just won the lottery? External factors affect state of mind and have a huge role in solution negotiation. In order to make a mediation effort as effective as possible and to achieve a result that maximizes the happiness of all parties involved, the mediator and mediation process at large need to be viewed as an outlet for stress relief rather than as an added source of stress.

The ultimate stress relief will naturally occur upon final settlement if the settlement is optimal. Still, mediation can effectively reduce stress at earlier stages in the mediation process, starting at inception, through judicious use of stroking. "Stroking" is commonly associated with phony flattery and has negative connotations when insincere.[29] More appropriately, it is the verbal reinforcement of what someone is doing well in order to encourage such behavior. Mediators deal with sophisticated business parties. They will see right through insincere flattery and will likely be offended by such gestures. However, if the mediator is genuine, "stroking" works for all mediation participants. Sincerely pointing out the positive (even if it is just their attitude) makes participants feel both appreciated and appreciative. This will alleviate the "going to war" instinct fostered by the litigation process, decrease the parties' desire to be combative, and reduce stress from the very onset of the mediation.

D. Communicate Effectively

All forms of communication are not equal. Anyone who has lost cell phone reception during an important call or has tried to decipher whether their spouse is angry from an email knows that some forms of communication inherently lack expression. Context

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28 *See generally* Am. Psychological Ass'n, STRESS IN AMERICA 3, Oct. 2007, http://search.apa.org/search?limited=true&section=pubs&query=stress (follow the link to the search result entitled *Stress in America*) (last visited Jan. 24, 2010).

29 *See* Thomas C. Clary, *Motivation through Positive Stroking*, 5 ENGINEERING MGMT. REV., IEEE 75 (1977).

plays a dominant role.[30] Proper mediation employs unique hierarchies of communication that mediators should zealously follow to avoid miscommunication.

There are two separate types of communication hierarchies that directly impact success. The first relates to the physical form, which would be apparent to any observer without any knowledge of the situation. The second relates more to the mindset of the communicators and deals with their personal level of comfort. While these hierarchies have significant interrelation, they are distinct. The mediator should continuously utilize the highest rung available on both hierarchies.

The first communication hierarchy contains the following physical forms in ascending order: 5) e-mail; 4) telephone; 3) in-person, in the presence of a third party; 2) in-person, one-on-one; and 1) in-person, one-on-one, while engaging in an external activity that the client enjoys. E-mail is bad. It simply should play a very limited role in business mediation because it creates a "paper-trail" that the parties do not desire, and there is a strong possibility of misinterpretation, particularly related to the subtleties of tone and demeanor that are best communicated with one's voice or physical gestures.[31] Telephone communication is much more effective, but still lacks both the personal connection that is present with in-person communication, and some of the ability to effectively communicate the aforementioned subtleties.

Most communication is non-verbal. Communications that occur in-person, but in the presence of a third party, can be more effective regarding these subtleties, but introduce a new difficulty because the party will be somewhat muted and hesitant to communicate fully with the mediator for fear of disclosing closely-guarded information to the third party. The fact is people communicate more freely when they are "off the record." These problems go away when the communication is in-person, one-on-one. This form of communication should be utilized frequently. The only better form of communication is in-person, one-on-one, while engaging in an external activity that the client enjoys. People frequently feel

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30 *See* Alan Sharland, *Effective Interpersonal Communication*, MEDIATE.COM, Sept. 2009, http://www.mediate.com/articles/sharlandA9.cfm (last visited Apr. 18, 2010).

31 Oregon Bureau of Labor and Industries, CONFIDENTIALITY AND INADMISSIBILITY OF MEDIATION COMMUNICATIONS, Proposed Rule 839-051-0010(9)(m), *available at* http://www.boli.state.or.us/ (follow "New/Proposed Rules" Hyperlink; then follow "Division 51 Final Rules Showing Changes" hyperlink) (illustrating an example of a court-admissible "paper trail" that many mediation participants fear—a proposed rule stating that certain written mediation communications are not confidential).

more comfortable with someone, and communicate more freely, when in a pleasurable environment.[32] Therefore, this form of communication should be used to build a foundation of camaraderie, particularly towards the beginning of the relationship.[33]

The second communication hierarchy contains the following forms, based upon the underlying thought of the parties, in ascending order: 5) in a group, with a "group mentality" that requires all discussion to be open and public; 4) in-person, temporarily in front of other people, but with the possibility to caucus; 3) one-on-one, when confidentiality is questioned; 2) one-on-one, when confidentiality is secure; and 1) one-on-one, with a personal relationship and high level of trust. The group mentality, fostered by some mediators, is very problematic.[34] It exacerbates the level of business animosity between opposing parties and the frequent presence of disagreement between people "on the same side." Also, it breaches confidential information that parties wish to conceal from others. In-person communication, while temporarily in front of other people but with the possibility to caucus, eliminates the mindset that "all information needs to be out on the table," but each party will still be relatively guarded in order to protect what they perceive to be their own interest in their information. The superior communication method is one-on-one, outside the presence of other people, and "off the record" (with confidence in total confidentiality) because the level of information obtainable will always directly correlate to the amount of trust the party has in the mediator, and the mediator's ability to maintain secrecy. If the party has gained a level of trust regarding the maintenance of secrecy with the mediator, then they are much more likely to provide more valuable information than if they are not sure the mediator will keep all disclosed information confidential. However, if the mediator goes through a courting session of sorts and can build a personal relationship and high level of trust, then even the most uncomfortable information, which is likely the most valuable in regard to focusing on underlying interests and reaching an optimal resolution, will surface.

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32 *See generally* Samuel D. Gosling & Sei Jin Ko, *A Room With a Cue: Personality Judgments Based on Offices and Bedrooms*, 82.3 J. PERSONALITY & SOC. PSYCHOL. 379 (2002).

33 *See supra* Part II.A.2.

34 Leonard L. Riskin, *Teaching and Learning from the Mediations in Barry Werth's Damages*, 2004 J. DISP. RESOL. 119, 134.

E. Shift Strategies Appropriately

There are three main recognized mediation styles: evaluative, facilitative, and transformative.[35] "Evaluative mediation focuses on the legal rights of the parties rather than their interests;" here, the mediator offers his or her own opinion regarding how the case would likely be resolved if continued in a litigation context.[36] In facilitative mediation, however, "the emphasis lies on making sure the disputing parties come to an agreement on their own." The mediator's role in this mediation style is much more centered on focusing discussions around underlying interests that the parties possess, rather than on surface-level legal rights.[37] Lastly, "[t]ransformative mediation is similar to facilitative mediation because it also emphasizes the empowerment of the disputing parties. The disputing parties structure the process and determine the outcomes, [while] the mediator's role is to help the conflicted parties recognize each other's values, interests, and points of view."[38]

Practitioners often believe that one of these mediation styles is superior to the others, and therefore statically employ their preferred style throughout each mediation.[39] Others may choose a particular style based on the circumstances of the case, and then change styles from case to case.[40] However, it is more appropriate to utilize mediation styles in a fluid manner—shifting between styles within the same mediation, depending upon the stage of the mediation.[41] This matches each mediation style's unique benefits and shortcomings to the appropriate phase of the mediation.[42]

The mediator should begin with a facilitative style. The pursuit of the underlying interests phase and the brainstorming of the potential solutions phase, both occurring near the onset of the mediation, benefit from a facilitative mediator getting the parties in a

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35 *Types of Mediation*, ARBITRATION-AND-MEDIATION.COM, http://www.arbitration-and-mediation.com/articles/define-mediation/types-of-mediation.php (last visited Jan. 23, 2010).

36 *Id*.

37 *Id*.

38 *Id*.

39 Zena Zumeta, LEARN TO MEDIATE, http://learn2mediate.com/resources/nafcm.php (last visited Jan. 18, 2010); *see generally* Leonard L. Riskin, *Mediator Orientations, Strategies, and Techniques*, 12 ALTERNATIVES TO HIGH COST LITIG. 111 (1994).

40 Zumeta, *supra* note 39; s*ee generally* Riskin, *supra* note 39.

41 *See generally* Dwight Golann, *Variations in Mediation: How—and Why—Legal Mediators Change Styles in the Course of a Case*, 2000 J. DISP. RESOL. 41.

42 Cris M. Currie, *Mediating off the Grid*, 59 DISP. RESOL. J. 9, 11 (May–July 2004) ("Most mediators resist defining themselves in terms of Riskin's four styles. The best mediators will draw from all available mediation techniques, depending on the situation.").

proper mindset. Parties embroiled in litigation focus on positions, not on underlying interests. To cultivate workable business solutions, the mediator should empower the business decision maker, which happens when they begin exploring productive possibilities. This style will produce momentum, and the pendulum should begin to swing.

To maintain this momentum, harnessing it into energy to reach an optimal resolution, the mediator should shift to a unique evaluative mediation style as trust is built and workable solutions emerge. This evaluative mediation style is different from that commonly envisioned within the mediation community.[43] The mediator may express his or her opinion regarding how the case would likely be resolved through litigation—but not for the purpose of persuading the parties. Mediators should resist the urge to prove their opinion is correct because trying to persuade is always counterproductive. Rather, mediators should express their own opinions to leverage legitimate differences in opinion, playing into the hands of people who have thoroughly convinced themselves that their legal position is correct. Attempts to convince the parties that his or her legal assessment is accurate would likely be futile and could very easily anger the parties in a counterproductive way. When business people have "lawyered up" with top-shelf attorneys from prestigious law firms, have invested an exorbitant amount of time and energy into litigation, and have drank their own "Kool-aid," their legal correctness is cemented in their own mind. A mediator's attempt to change this may be viewed as sophomoric and arrogant—a huge criticism of mediation professionals by the business community. Rather, the mediator should express his or her opinion of the legal positions in a way that will help the parties feel as if they have won, regardless of the mediator's opinion and the solution ultimately reached.

For example: a start-up title insurance agency, funded by a prominent private equity firm, and a leading insurance company entered into negotiations to start a joint venture. Each side, represented by preeminent legal counsel, conducted due diligence, negotiated, and drafted documents. Everything was all set to go, and they scheduled a closing. The morning of the closing, the insurer

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43 Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the "Grid" Lock*, 24 FLA. ST. U. L. REV. 985, 991 (1997) (postulating that the commonly-envisioned style of evaluative mediation "provides guidance to parties as to appropriate settlement terms in light of the legal, industry, or technology considerations with which the mediator is reasonably conversant.").

notified the start-up that it refused to close. Litigation ensued, which for years bounced up and down state trial, appellate, and supreme courts—with no end in sight (except millions more dollars in legal fees). The central $20 million issue before the supreme court, in addition to other smaller legal issues, was whether to recognize a promissory estoppel exception to the Statute of Frauds. The insurer sincerely was 90% confident of success (so would settle for $2 million), and the start-up sincerely was 60% confident of success (so demanded $12 million). Such strident opinions and a $10 million delta create a huge roadblock—under the traditional adversarial model, there was no bargaining zone and a large disparity. Exploration of the parties' underlying interests, however, revealed that the insurer's primary underlying concern was recognition (to himself and his bosses) of his "well-formed" legal argument. The start-up's primary underlying concern was limited financial exposure.

We used an evaluative mediation style and expressed a legal opinion, not to convince anyone, but to structure a settlement to leverage legitimate differences in opinion and to make both parties feel as if they won. Given that eighteen other states recognized an estoppel exception (along with other reasons) we disagreed with the insurer, but structured a settlement that satisfied the insurer's underlying interest. The structure permitted the central $20 million issue to proceed to verdict. This verdict, in turn, affected the settlement amount and all lesser issues included in the litigation would be resolved—limiting risk exposure significantly for each party, and resolving all litigation that would likely have continued extensively. Both parties agreed, feeling that they each got the better economic deal and had their underlying interests satisfied through an opportunity to still have the court render a decision.

F. Ask Ignorant Questions

People want to appear smart. They want to know it all. So they make statements rather than ask questions. They may think that they are asking a question, but in actuality, they are not. Listen (discreetly) to other people's conversations. Listen to the words they use, and the way they form sentences. Odds are, you will hear straightforward statements and statements dressed up like questions, but virtually no genuine, information-seeking questions. This may seem random and even unimportant, but it is critical.

The mediator must be vigilant in questioning in order to avoid this trap.[44]

A question, by definition, is an admission of ignorance—there is something that the speaker does not know. People are loathe to appear ignorant, so they make statements or ask narrow questions that suggest familiarity with an issue.[45] For example, asking the question, "What's the problem?" suggests the questioner's complete lack of knowledge, but rephrasing the question as, "The problem is X, right?" implies intelligence by suggesting knowledge of the answer. Even if the questioner is incorrect about what the problem is, the questioner believes that he or she is giving off the impression that they have thought about the issue, regardless of whether they have reached the correct conclusion. In *form*, the questioner is seeking confirmation that they have reached the correct conclusion, but in *actuality*, this is really a statement dressed up as a question—to appear smart. The questioner has already made up their mind about what the problem is, and if the listener does not respond with the answer "Yes," then the listener will likely have some convincing to do in order to persuade the questioner that the problem is actually something else.

The way to truly obtain large amounts of unadulterated information is to be willing to appear ignorant by asking open-ended questions—questions that suggest no prior knowledge.[46] Broader questions are better, particularly in the initial information-gathering stage of a mediation. "What's the problem?" is much better than "The problem is X, right?" in eliciting information from the listener, but it still directs the listener because it presupposes a "problem." "Tell me about what happened" is more effective in gaining information. It does not limit. Giving the listener the impression that you are completely ignorant can be part of the objective. The listener who feels "smarter" will enjoy the role, want to "educate," and will respond by providing as many details as possible without overlooking anything—even the most fundamental of issues. If there truly is a "problem" in the eyes of the listener, it

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44 At later stages, particularly when asking about potential solutions, it will likely become much more appropriate to ask narrow questions that focus upon one specific piece of information.

45 *See* Arlene Harder, *What Happens When People Don't Ask Questions?*, SUPPORT4CHANGE (2007), http://www.support4change.com/questions/hesitate.html (last visited Jan. 17, 2010).

46 *See* Roy Chitwood, *Ask Open-Ended Questions to Get Good Info*, PUGET SOUND BUS. J. (Oct. 31, 1997), *available at* http://seattle.bizjournals.com/seattle/stories/1997/11/03/smallb5.html.

will naturally come out in the response to a broad question along with many other issues missed by "What is the problem?"

This is a particularly easy (and fatal) trap for mediators to fall into. Our training, expertise, and yes, pride, which if unchecked, causes us to "fix" people's problems before fully understanding them. Remember, ignorance in information-gathering is smart, *very* smart—not stupid or ignorant. Broad questioning leads to thorough answers, valuable information regarding underlying interests, and appreciation by parties who finally feel as if their story is fully being heard.[47]

G. Tweak King Solomon

Business people hate when mediators attempt to "split the baby." That's the mental image that arises in the mind of many business leaders when considering business mediation: a "neutral" pounding the table and spouting clever arguments to convince one party to pay more and the other party to accept less so they meet in the middle. Much of the body of mediation literature has attempted to address this issue by counseling mediators to "expand the pie"—find out what the parties really want and expand the solution beyond purely distributive issues to other issues that provide value to the parties and create "win-win" solutions.[48] For example, salary negotiation for a new hire is frequently viewed as a purely distributive issue, such as whether the salary can be higher or lower; if one party wins, the other party loses. However, if the pie grows to include other issues, such as vacation days, working at home, a signing bonus, and other issues valued differently by the negotiators, then the solution becomes better. While conceptually wonderful, this concept has only moderate success in actual mediation scenarios because the model is dependent upon the mediator's ability to actually discover underlying interests. Pie expansion requires realization of issues. Given that the traditional process of mediation needs revamping to more effectively uncover underlying interests, typical pie expansion is marginal at best.[49]

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47 *Id*.

48 *See* Renee A. Pistone, *Case Studies: The Ways to Achieve More Effective Negotiations*, 7 PEPP. DISP. RESOL. L.J. 425, 427–28 (2007); *see also* Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOT. L. REV. 1, 32 (1999).

49 *See supra* Part III.B.

Note that a common mediator is a retired judge.[50] Respectfully, retired judges' skills and strengths can be at odds with mediation's goals. While a mediator must vigilantly focus on integrative, win-win *business* solutions, judges' are used to calling "balls and strikes," and they gravitate towards an evaluative, adversarial, zero-sum mindset.[51] Those who are predisposed and accustomed to an adversarial legal system, such as retired judges, rarely change when brought into a business mediation context. Accordingly, the parties are likely to receive distributive legal "solutions" rather than integrative business solutions.[52]

This article advocates a model that forces a dramatic shift from distributive to integrative bargaining and focuses on differences in interests that create positive leverage.[53] After learning of all underlying business interests, a mediator should list each interest and ask the party to rank the interests in order of priority. This activity helps identify differences in order to create bargaining zones. If two parties, for example, list the same or similar interests, but rate them differently in priority, the mediator can suggest that the party that ranked it lower trade it to the party who rated such interest highly in exchange for something the former party held as a higher priority. This process expands negotiations away from a single distributive issue, and is good as far as it goes, but once the mediator has this valuable hierarchy information, the mediator can likely accomplish much more. Going back to the example of the product owner with the odd affinity for the number two, the number two issue would be ranked very highly on his list, but likely would not even appear on the other party's list. The mediator could use this difference in interests to expand the pie (i.e., suggesting having the product logo flashed across the bottom of the screen at two minutes past every hour for a month in exchange for giving up the contracted slot covering 2:22 p.m.). Although this may sound crazy, the owner may appreciate this solution more that the original deal. This is value-added mediation. Assuredly, such a beneficial solution can be imagined only if the mediator under-

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50 *See generally* Louise Otis & Eric Reiter, *Mediation by Judges: A New Phenomenon in the Transformation of Justice*, 6 PEPP. DISP. RESOL. L.J. 351 (2006); Dean B. Thomson, *A Disconnect of Supply and Demand: Survey of Forum Members' Mediation Preferences*, 21.4 CONSTR. LAW. 17 (2001).

51 *See* Pistone, *supra* note 48.

52 *See* Jerry Roscoe, *Advocacy Skills: Tips for Selecting a Good Mediator*, INT'L ACAD. MEDIATORS, http://www.iamed.org/pub_roscoe.cfm (last visited Jan. 20, 2010) (arguing that expert mediation skills are more valuable than expert skills in any particular subject matter).

53 *See supra* Part II.B.

stands that people have idiosyncrasies and that it is his job to identify and leverage personal differences.

The number two example is deliberately extreme in order to provoke thought regarding unlikely interests. An expansive and ground-breaking real life example concerns a well-known warehouse chain's store, located on a former landfill that was slowly sinking into the ground. Remediation costs had exceeded $20 million, and experts predicted a complete fix would cost an additional $30 million. A leading global insurance company, which had issued an excess liability policy for catastrophic losses in excess of $25 million, had commenced a declaratory judgment action before an arbitration panel in London for coverage denial. A "White Shoe" law firm representing the insured and a "Magic Circle" law firm representing the carrier litigated for years, at a combined cost in excess of $5 million. The insured had suggested a "split the baby" (50/50) settlement that the carrier promptly rejected. Employing the model advocated in this article, we discovered a disconnect between the parties' *unreasonable* legal positions and their *reasonable* underlying interests. The insured, who respected their expert, believed they had to spend another $30 million to fix the problem if the store continued to sink. The carrier, knowing that the insured "got by" without remediation for years, believed that the problem may have ended. Why pay now if there may be no problem in the future? Also, the carrier wanted the insured to have "skin in the game" so that the insured would not make unnecessary and costly repairs simply because they would be paid by someone else. So the suggested optimal solution proposed by the mediator became a "pay as you go" option—as, when and if the insured made repairs, the carrier would reimburse half. This solution expanded the pie based on critical information learned from the process in this model.

H. Heed Emotions

As a child, each new school year, my dad would say: "Figure out what the teacher wants, and then give it to her." This principle applies well to parties in mediation and has an applicable emotional component. What do parties *want*? It often is not what is objectively most financially rewarding or even beneficial for one's career. People have subjective emotional reasons. So, a mediator

should use the expression of emotion by the parties as signals—not distractions.

Human beings are emotional creatures, and in business mediation, the mediator deals with the human faces of the business entity. These human beings have unique emotional needs that need tending.[54] In *Beyond Reason*, Roger Fisher and Daniel Shapiro shed light on five core emotional concerns: Affiliation, Appreciation, Autonomy, Role, and Status.[55] There is an extensive body of literature about each of these core needs.[56] They exponentially aid in mediation and are synergistic to our model. Recognizing and satisfying emotional needs makes superior solutions. And, expression of emotions by the client is a powerful way for the client to signal to the mediator when they have touched upon an underlying interest landmine.

Mediators often attempt to comfort angry parties and view their emotional outbursts as a necessary evil to "get out of their system" before they can progress to level-headed discussion.[57] On the contrary, the mediator should interpret an emotional outburst as the end of a rainbow, signaling a sensitive underlying interest that has been buried by a party and is the key to reaching a superior solution. For example, when serving as mediator for the same party on several different matters, behavior patterns emerge. One general counsel in particular always inevitably erupts—screaming at me a profanity-laced tirade against my competence. This is not a mere unpleasantry that should be ignored, nor is it an emotional outburst that should be massaged until the party fully vents. This information is a goldmine. It is a large red flag, signaling that the issue at hand hit such a nerve that it is likely both the source of, and the solution to, the conflict. View expressions of emotion as sources of information about hidden underlying interests that can

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54 *See generally* Max Factor III, *An Angry Negotiator*, L.A. DAILY J., Aug. 17, 2007, *available at* http://www.iamed.org/angry.cfm.

55 ROGER FISHER & DANIEL L. SHAPIRO, BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE 21 (2005).

56 *See generally* LEIGH THOMPSON, THE MIND AND HEART OF THE NEGOTIATOR (3d ed. 2005); MICHAEL L. MOFFITT & ROBERT. C. BORDONE, THE HANDBOOK OF DISPUTE RESOLUTION (2005); Peter Salovey & John D. Mayer, *Emotional Intelligence: Imagination, Cognition, and Personality* 9, 185–211 (1990), *in* EMOTIONAL INTELLIGENCE: KEY READINGS ON THE MAYER AND SALOVEY MODEL (Peter Salovey, Marc A. Brackett & John D. Mayer eds., 2004); DANIEL GOLEMAN, EMOTIONAL INTELLIGENCE (1995); Daniel L. Shapiro, *Negotiating Emotions*, CONFLICT RESOL. Q. (2002).

57 *See* Lori S. Schreier, *Emotional Intelligence and Mediation Training*, 20 CONFLICT RESOL. Q. (2002).

be interpreted and used to gain momentum, rather than derail or delay discussions, as is usually the case.

I. Make People Feel Like They Have Won

Success in mediation is defined, at least in part, subjectively.[58] The underlying interests of the parties frequently transcend money and need to be satisfied through integrative solutions. When done right, all parties will be *happy*—happiness is victory, regardless of the objective solution. Perception can be reality, and in business mediation, if someone feels like they won, they have truly won.

Parties in business mediation often appeal to what is "right" and "fair."[59] This seems objective but it is really subjective. They are really saying what *they* want—what would make them feel like they won. For instance, we mediated a dispute over water damage and property rights between two parties with a long and unpleasant history together. The liable party acted in good faith, but without insurance, and could be declared bankrupt without a creative solution. His underlying interest was maintaining livelihood. The aggrieved party is fabulously wealthy, unconcerned about money, and his focus frankly seemed to be revenge for perceived bad acts. What really was his underlying interest? Answer: Respect. So, we crafted a solution that "gave the teacher what she wanted:" respect. This included some public, genuine "gravelling" that made him feel respected and feel like he "won." And, it ended up costing the liable party virtually no money.

IV. Unprecedented Results

True mediation success—exponentially better than litigation or other mediation—requires unconventional ground rules and an unadulterated procedure. They are synergistic. One enhances the other, and both combine to maximize business dispute solutions. Some mediators ask excellent open-ended questions and are extraordinary communicators, but compress this process into a one-day mediation session. That stunts the percolation necessary for enhanced solutions. Virtually no mediator employs our structure,

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58 *See* William Ross, *Measuring Success in Mediation*, Mediation J. 1, 1–16 (2000).

59 *See* Elaine Smith, *Danger-Inequality of Resources Present: Can the Environmental Mediation Process Provide an Effective Answer?*, 1996 J. Disp. Resol. 379, 384.

and many try to convince the parties to "split the baby" rather than elicit the parties' underlying interests in order to come up with an integrative solution. Mediators who marry style and framework in the manner prescribed achieve unprecedented results.

A. Mediator Can Guarantee Results

Every business dispute between reasonable people can be resolved if the facilitator is committed, creative, and communicates appropriately. Businesspeople are generally reasonable human beings, and although the adversarial system often forces them into taking unreasonable legal positions, they usually hold reasonable underlying business interests. When contemplating a new matter, the mediator's focus should be to make an initial reasonableness assessment—not regarding the reasonableness of the legal positions but regarding the reasonableness of the decision-makers. If the parties are unreasonable, pursuing other than their own best interest or the interest of their company, they belong within the adversarial litigation system. But, if they are reasonable, regardless of how unreasonable their legal positions may be, the dispute *will* settle. Competent mediators can guarantee this result.

B. Healthy Success Fee

Compensation should be commensurate with the value provided to the consumer. Mediation is no exception. Therefore, if no settlement is reached, no value has been provided to the consumer, and the mediator should not receive any compensation. No deal, no fee. On the other hand, the successful (and optimal) settlement of a time-consuming and expensive legal battle is of great value to the parties. The catalyst of such (the mediator) should be handsomely rewarded. This is an intellectually pure approach. All parties involved are in business to make money (including the lawyers and the mediator)—this is the world in which we live. If all of the conflicts of interest are stripped away, this is the truly honest structure that remains—payment for value, pure and simple.

Our model charges at least twice the normal lawyer hourly billable rate (per side)—entirely contingent upon success. Success means the client is *happy* with the outcome. Therefore, parties do not pay any mediation fees unwillingly. In fact, they are always

happy to pay this fee. Compared to the risk, delay, and cost of litigation, and given the truly value-added nature of our solutions, the fee is a bargain. This fee structure is a true win-win for the parties and for the mediator.

C. 100% Success Rate

Our success rate, employing the rules and strategies outlined herein, is 100%. The system works. The proof is in the pudding, and any lingering doubts about the validity of this mediation theory should be put to rest upon this track record. Traditional mediation practices are intermittently successful in providing a resolution that is marginally better than litigation, but mediation is capable of so much more. These practical adjustments consistently lead to an optimal mediated solution—exponentially better than anything attainable in either a courtroom or with traditional mediation.