

The Importance of Using Mediation Techniques in Deal Making, Before and During Disputes

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JUSTICE MARIE L. GARIBALDI AMERICAN INN OF COURT

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Agenda

- What is Deal Mediation?
- “The Business Relationship Continuum” ^{sm**} and “The 10 Stages of a Deal” ^{sm**}
- The Deal Counselor’s/Mediator’s Perspective
- Benefits of Using Mediation Techniques
- Guess Who Becomes the Real “Client”?
- Lessons from Construction Deals/Disputes
- Questions and Answers

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What is Deal Mediation?

“Deal mediation is a new application of an existing process. It is the application of Interest Based Negotiation to negotiate and close transactions.”

- Joan Stearns Johnsen, Esq.

Is a neutral third party REQUIRED?

What is Wrong Here?



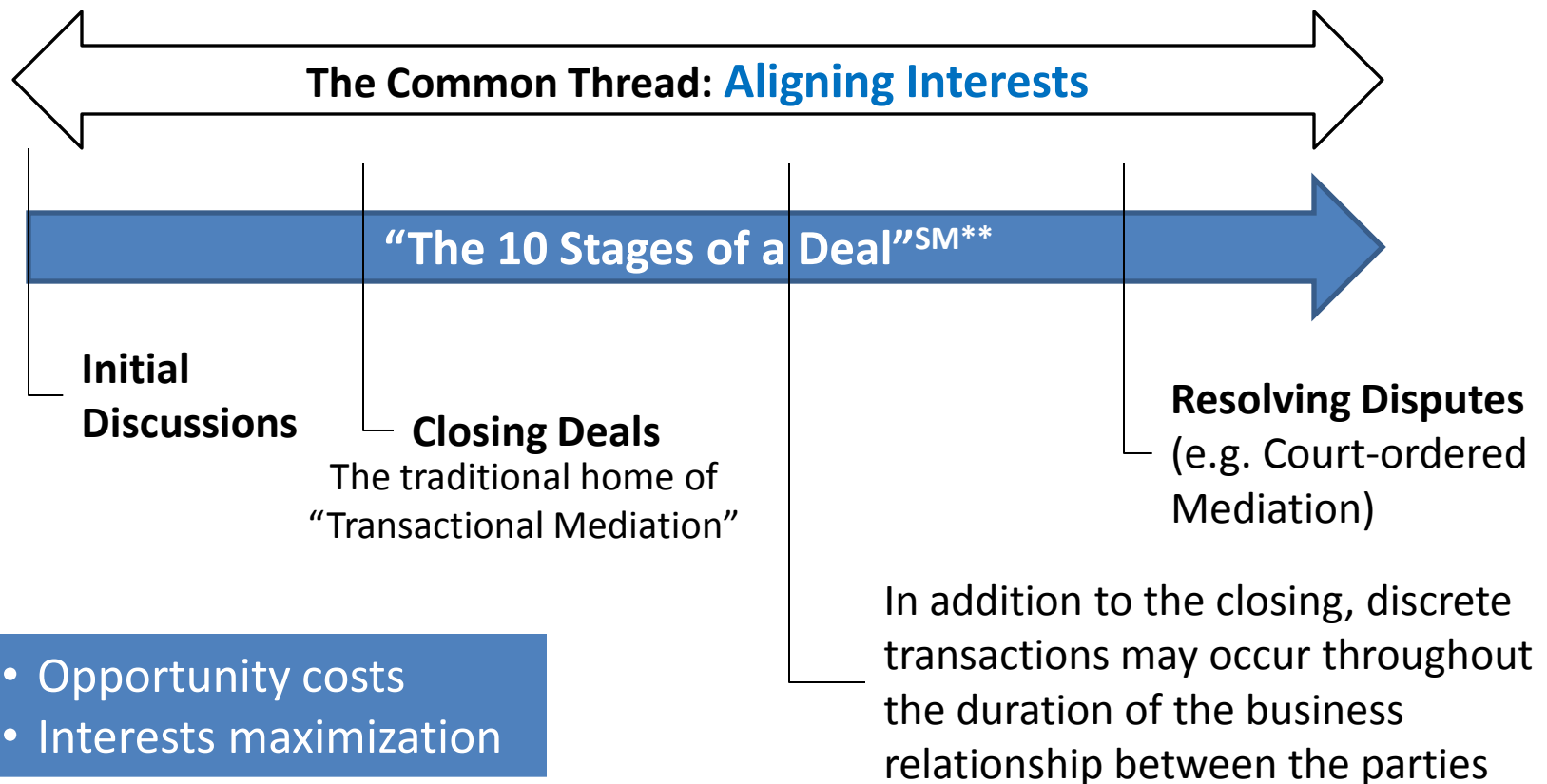
"I do have a fallback position,
but it involves firearms."



"You've made us terribly happy, and we
hope you aren't feeling stupid."

Positions vs. Interests Maximization

“The Business Relationship Continuum”^{sm**}



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“The 10 Stages of a Deal”^{SM**}

Deal Stage

STAGE 1: Initial dialogue

STAGE 2: LOI / MoU / PoA

STAGE 3: Formal legal arrangements

STAGE 4: Formal amendments

STAGE 5: Negotiation impasse

STAGE 6: Voluntary ADR

STAGE 7: Litigation

STAGE 8: Court-ordered ADR

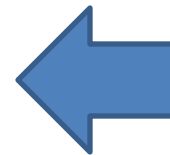
STAGE 9: Ongoing litigation / ADR opportunities still exist!

STAGE 10: Partial/complete dispute resolution by litigation or otherwise

“Not Just For Disputes!”^{SM**}

Mediation Techniques

- Active Listening
- Fact Finding
- Probing
- Caucusing
- Options Generation



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The Deal Counselor's/Mediator's Perspective

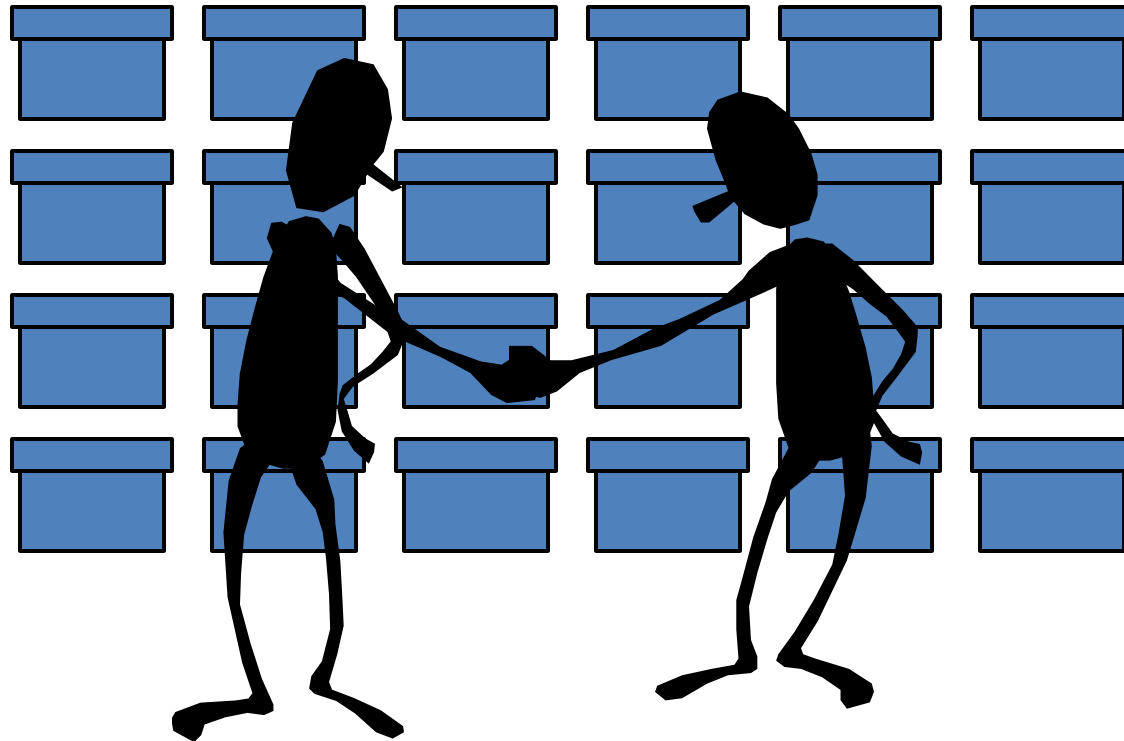
The Deal IS the Client!

Deal Making is the Process of:
**IDENTIFYING, ESTABLISHING, DEFINING,
BUILDING AND SUSTAINING a RELATIONSHIP
AMONG THE PARTIES**

**Better deals are struck when a Relationship
view is taken rather than a Transaction view**

Both BEFORE and DURING Disputes

“The Wall of Shoe Boxes”^{SM**}



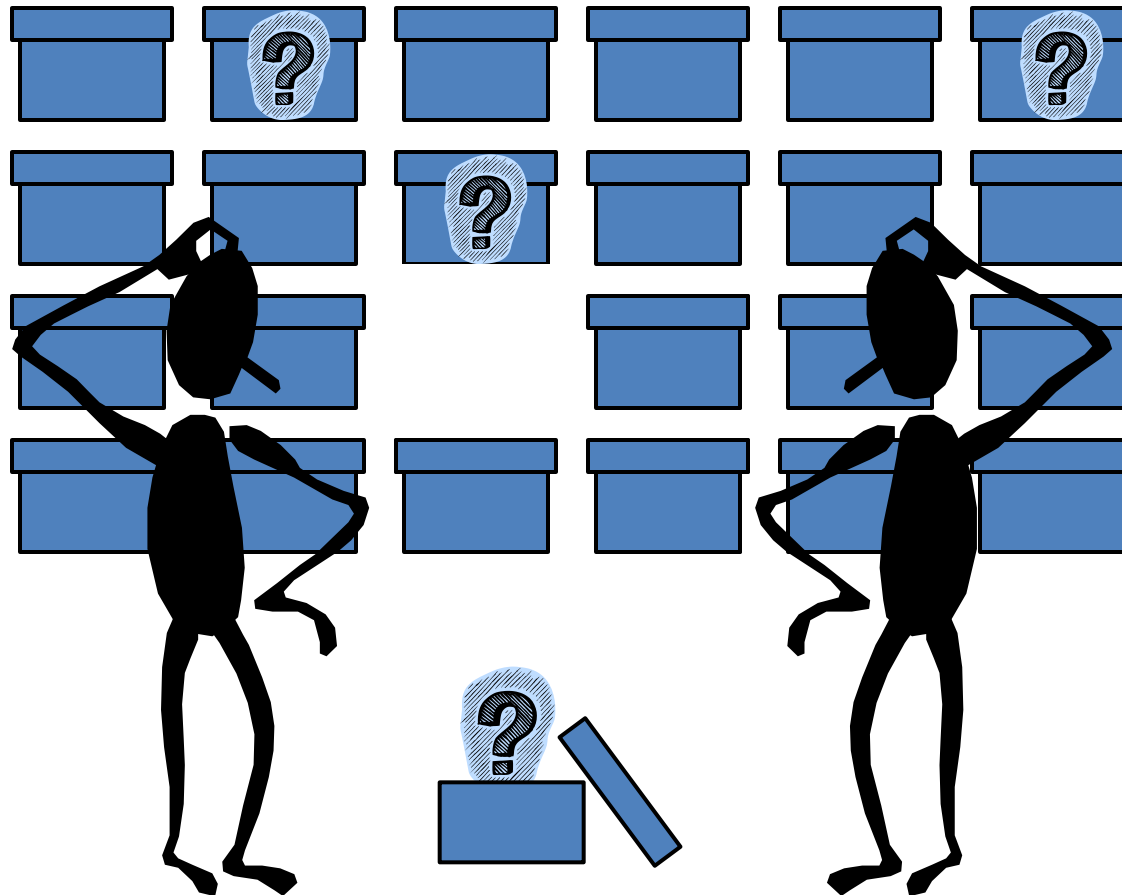
The “Wall of Shoe Boxes” represents the full range of the relationship between the parties. Each “box ” contains an issue or a transaction between the parties on which they either agree or disagree, but the integrity of the overall relationship continues intact.

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“The Wall of Shoe Boxes”^{SM}**

(The Continuing Relationship)

**When Disagreements/Conflicts Arise,
How Best Handled? As Here, “*Piecemeal*”?, OR**

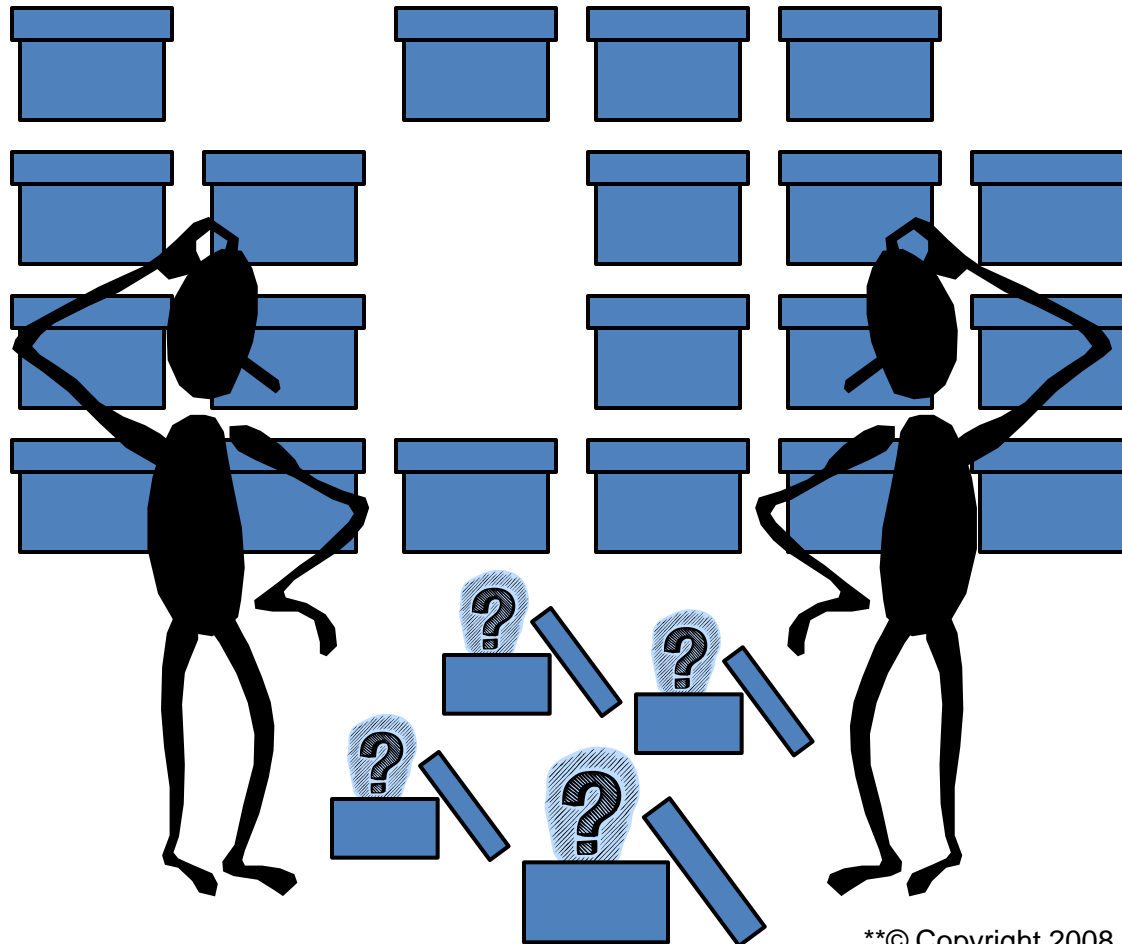


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“The Wall of Shoe Boxes”^{SM}**

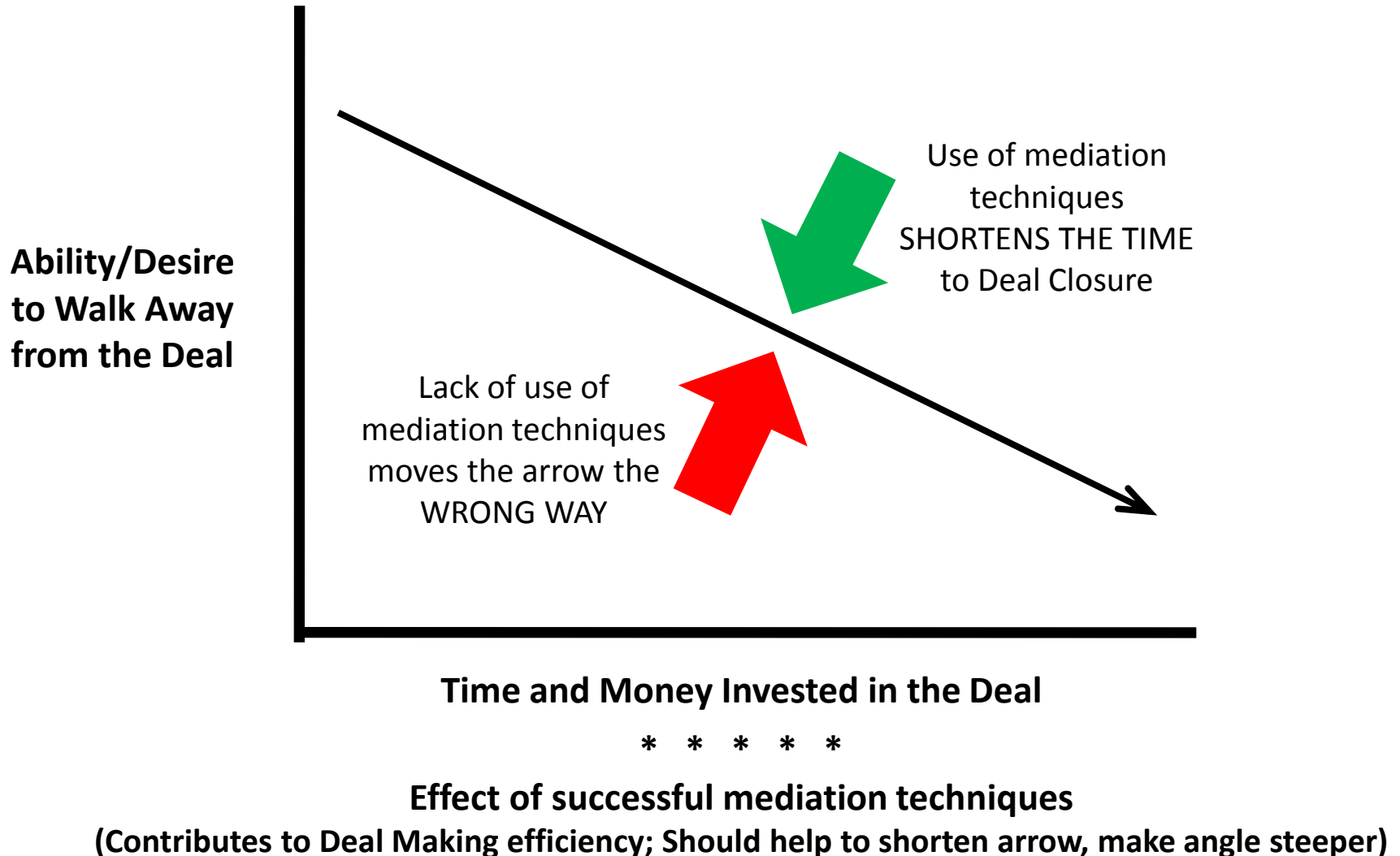
(The Continuing Relationship)

**When Disagreements/Conflicts Arise,
How Best Handled? Or, as Here, “*All together*”?**

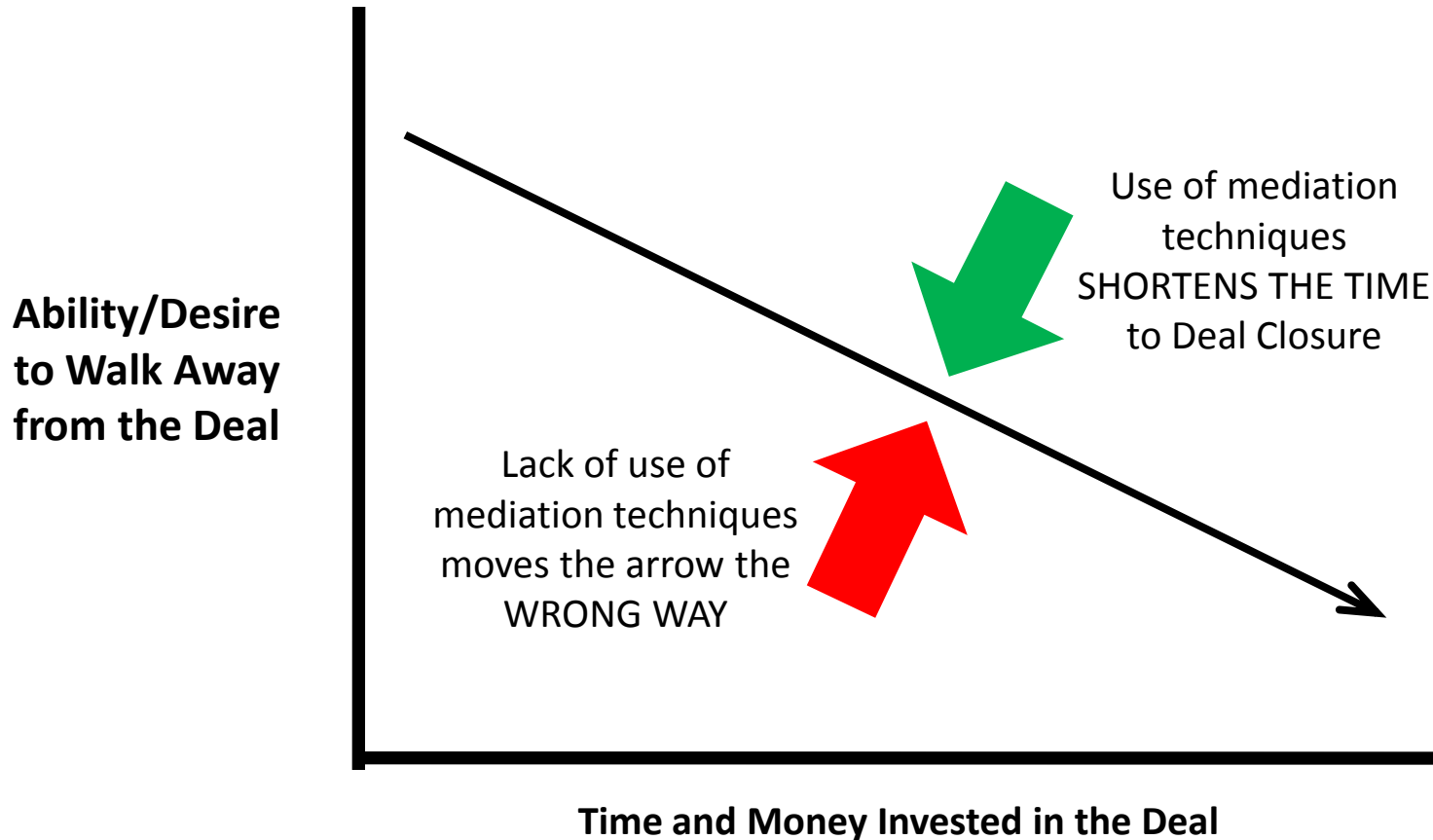


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Deal Pressure



“Deal Pressure Continuum”_{sm**}



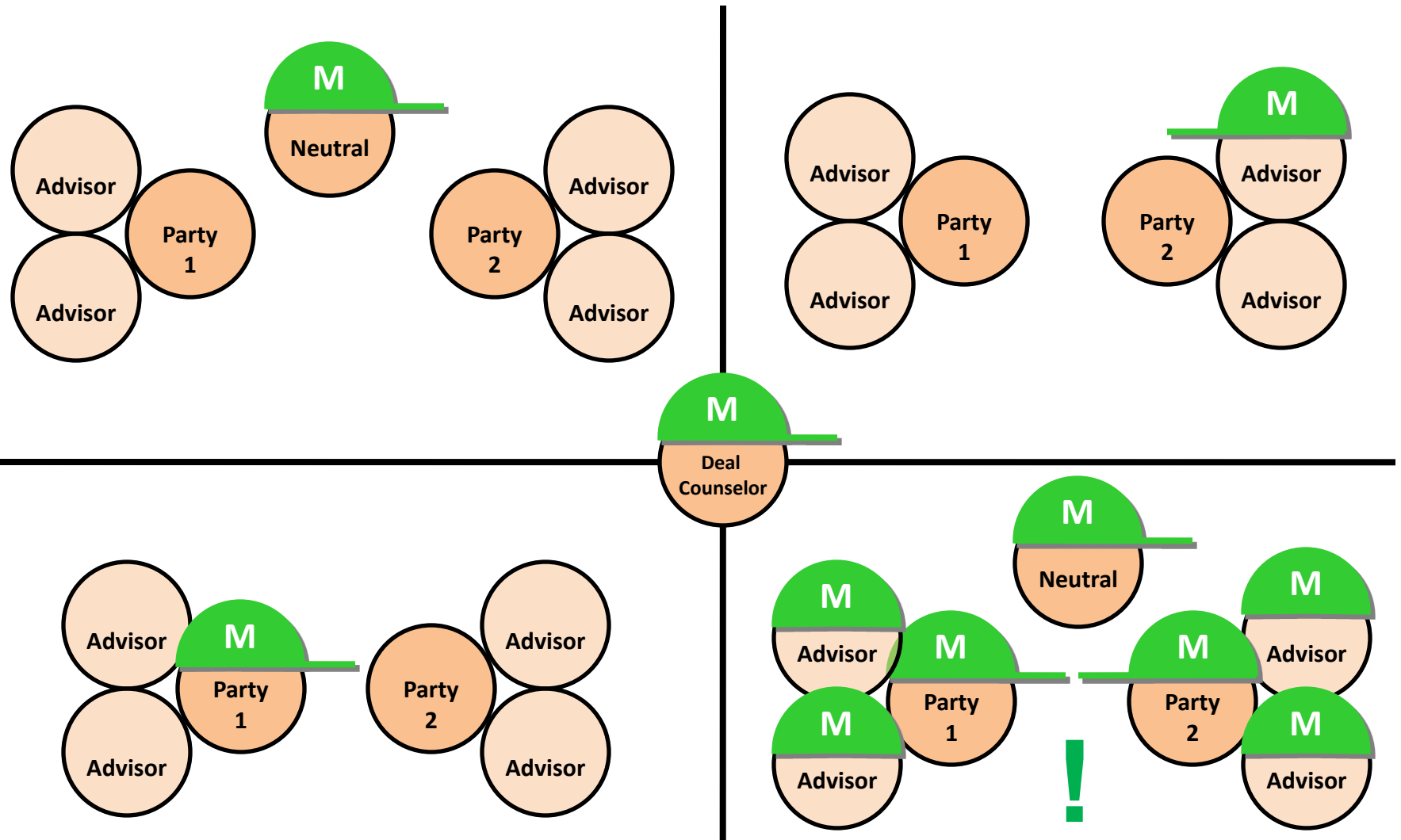
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Negotiations--Informal disputes--Formal Disputes--Litigation--Resolution
(These same concepts are even *more compelling* in “Litigation” environment!)

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The Deal Mediation Role:

Who brings the mediation skill set into the room?



Benefits of Using Mediation Techniques

- Value of the process
 - Fosters better long term relationships
 - Navigates imbalance of power toward mutual commercial/public and/or “not for profit” interest
 - Demonstrates higher strategic thinking by parties
- Dimensions brought by the mediator/deal counselor
 - Subject matter expertise (How vital is it?)
 - Cultural understanding (not just international deals!)

Lessons From Construction Deals/Disputes

Lessons From the Trenches

- Dispel the myth! – “The deal will not close until/unless everyone leaves unhappy.” NOT!!!
- Mediation techniques minimize deal breakdowns and enhance deal closure and sustainability
- There is no perfect document
- The “Reality Oriented Mediator / Deal Counselor”
 - Facilitative, Evaluative, Transformative as required

Need For More Green Hats!!

“COLLABORATE NOT LITIGATE”

The VALUE of Deal Mediation, Particularly in CONSTRUCTION Deal Making/Dispute Resolution

Questions & Answers

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Thank You!