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Not Just for Disputes! Mediation Techniques in Negotiations and Deal Making

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In contemporary American society, we think of using mediation and mediation techniques rather narrowly – primarily as a tool to resolve conflicts and disputes. Instead, we should think more broadly and use mediation techniques, including where possible, formal mediation, much more widely in the negotiations and deal making phases of business transactions, well before formal disputes arise, and in various private and public sector settings.

Let me offer a bit of perspective on my experience, and thus, my viewpoint. For 32 years, I worked for The Port Authority of New York and New Jersey. A large part of my career there involved complex, multifaceted negotiations, typically with multiple public and private entities at the table. My position, General Manager, Regional and Economic Development, required an intense, longterm focus on deals that would lead to self-supporting regional and economic development projects and groups of projects comprising developments. These deals often consisted of multiple agreements and associated arrangements that would have to survive over decades and meet a myriad of competing interests. Often, the Port Authority itself had internally competing interests that were difficult to reconcile. Sometimes, crafting a deal that met the agency's various requirements proved more challenging than meeting the many needs of the affected parties.

Many of the negotiators who represented the constituencies affected by the projects and developments were what I might call "old school negotiators." They expected that "a deal will not close until each party leaves the room equally unhappy." They figured "you would win some and lose some," so they did not consider "win-win" options, and given that they also thought that "you should *never* negotiate against yourself," they were often uncertain as to whether to make concessions off of their (often overreaching) initial offers. Gestures of accommodation were constrained since they were perceived as conveying weakness. Thus, arriving at solutions that met enough parties' legitimate interests to consummate deals was often a protracted process. In such situations, a "mediator" or "deal counselor" would have been quite helpful, facilitating gestures of accommodation without having a party appear weak.

Some readers may recall the Port Authority's work in the redevelopment of the region's underdeveloped assets, particularly "on the waterfront" in Hoboken, NJ and Queens, NY. It took 25 years for these developments to move from concept to significant actual development. Individuals and entities involved worked together over decade-long timeframes through changing business cycles and political leaderships. Thus, persistence, patience and sensitivity to negotiating a myriad of issues so as to maintain and nurture long-term relationships were a prerequisite to agreements and actual project development.

While my role was not as a formal mediator, I came to understand the value of utilizing mediation techniques to gain the trust of other parties in negotiations to reach agreements. My negotiating style over time increasingly relied heavily on a mediation mindset. I usually was looked to by other parties as someone who would understand each party's interests, including the Port Authority's, but could be counted on to suggest creative alternatives to meet each party's respective interests in a way that was fair to all concerned in the spirit of accomplishing the deal. I recognized that the root of one's ability and credibility to function this way is to be trustworthy in statements, actions and reactions, that is, to act like a mediator.

To help convey how you might employ mediation techniques in your complex (or not so complex) transactions (as I and some of my colleagues did in ours), identified below are 10 stages of negotiations and deal making involving two or more parties (private or public) that would benefit from the skilled use of mediation techniques. These stages represent a chronology of activities, starting with initial contacts and relationships relating to a deal, and concluding with the termination of such contacts and relationships. Among the 10, only three (Stages 6, 7, 8 below) are where mediation techniques are now commonly considered and employed. I will not spend much time there, but will instead concentrate the majority of my comments on the other seven Stages where mediation is not now as commonly employed, but where I feel it and mediation techniques should be more proactively considered and utilized.

Stage 1
Establishing initial business contacts and relationships among two or more parties. Stage 1 offers each party to a potential deal the opportunity to imbue the prospective relationship associated with the nascent deal with a mediation mindset framework of behavior — open communications within a context of confidentiality, actions and words to build trust among the parties, and a frank assessment of options that will make a prospective deal desirable and workable for each party. Here too, a third party, even if not a true neutral, at least trusted by the parties to the deal, can have a productive role — as a deal counselor who can help maintain the desired mediation mindset framework as discussions and negotiations proceed. Friendly mergers are sometimes facilitated by outside third parties who serve in effect as "deal counselors," including, for example, investment advisors, attorneys, or accountants. In family business situations, perhaps a trusted relative could be tapped to assist as a deal counselor or facilitator. Even hostile takeovers could be turned friendlier through mediation techniques facilitated by a deal counselor. Also, very importantly, it is at this early stage that a determination not to proceed with a particular party or deal is best made with less cost and fewer adverse consequences than later on. Better to find out earlier than later, for example, that the chemistry among the parties will be difficult to overcome to close a reasonable deal or to carry it out. Contrast this with the incorrect assumption of hard bargaining tacticians that each side's early intransigence can be later overcome by creating a real or perceived power imbalance between or among one or more of the parties. Even if one party ends up making a short term great deal that is not good for the other(s), that party has sowed the seeds for serious challenges in implementing what may be agreed to — likely guaranteeing deal disputes and breakdowns. It is good to remember that at this early stage, each party is likely to be on their best behavior and to have their most optimistic forecasts of the future. Thus, spending time to allow each side to assess real behavior as arrangements relating to the proposed deal are discussed and evaluated is critically important at Stage 1.

Stage 2
The Stage 1 contacts and relationships may generate, or evolve, to include, initial understandings, which may or may not be codified in "Letters of Intent," "Memoranda of Understanding" or "Principles of Agreement." These are usually intended not to be legally binding. However, any of them would help frame and focus anticipated discussions and negotiations to follow. (Of note, to foster an early team spirit among the parties, I sometimes would suggest adding the word "Joint" in the title of these documents — thus, for example, "Joint Statement," or "Joint Letter of Intent"). At this point, parties involved have invested more time in the direction of making a deal. But, it is likely still relatively early in the process

and parties are gauging the pluses and minuses of proceeding and the merits of the deal for themselves, as well as the behavior of the other parties, including fairness, trustworthiness of each party, and openness of communications. This Stage 2 therefore still offers the opportunity for assessing in the preparation, content and responses to Letters of Intent (or other codification of current understandings of the direction of the deal) if you want to proceed with the deal in the making. Power imbalances (that may be real) may show up in proposed Letters of Intent, or drafts thereof. Each party can assess if hard bargaining (positional) tactics are being used – which tends to undermine the needed reservoir of goodwill usually required for an effective deal to be made and last. For example, if one side prepares a Letter of Intent and sends it after a meeting or series of meetings, without consultation with the other side before sending it, the other parties should evaluate if this is behavior they want to encounter throughout the rest of the negotiations and after, if a deal is made. Here too, if a deal counselor or trusted adviser were already involved, such usually counterproductive unilateral behavior would be less likely to occur, since that individual would be encouraging a more collaborative, joint approach in developing and wording such statements of intent, understanding(s) or agreement(s).

Stage 3
Following those written codifications of common intent in Stage 2, subsequent discussions or negotiations may then lead to formal legal arrangements. These arrangements should include provisions and mechanisms to address the interests of participating parties, under changing conditions. As conditions change, differences occur between the parties. For contract terms involving a number, dollar figure, financial calculation, or a valuation, it is usually advisable to provide in the formal legal agreement for referral to an outside expert agreeable to all parties, such as an accountant or C.P.A., or perhaps an appraiser, and for a procedure to involve and select such an individual. If additional broader issues arise that seem to be leading the parties toward litigation, a deal counselor or trusted advisor could be sought, even if one had not been utilized before, or not provided for as a dispute resolution option in the agreement. As we all know, such differences are likely to arise in implementing most formal legal arrangements. If not dealt with effectively, such differences may lead to litigation with all its costs and perils to long term, mutually beneficial relationships.

Stage 4
The efforts occurring in Stage 3 aimed at resolving differences within the context of the existing legal arrangements may reveal that for the legal arrangements to continue to be responsive to the interests of the affected parties, formal amendments to these arrangements are required to permit the relationship to proceed forward in a positive way – versus moving to formal disputes and potential litigation. Use of a trusted outside advisor or deal counselor would be beneficial here as well to help the parties maintain that mediator mindset. This is particularly important at a stage like this where things are "unexpectedly" being changed. Here, the need for encouraging and maintaining mutual trust, issue focus, issue definition and open communications is critically important to enhance mutual "option" development and to thereby forestall a tendency to focus on fault finding and finger pointing – which can too quickly lead to impasse.

Stage 5
Impasse may arise when the discussions or negotiations of Stage 4 do not result in a mutually agreeable resolution of one or more issues. Such impasses may well ripen into one or more formal disputes. Hopefully, the formal legal arrangements have included provisions to provide a structure for registering and dealing with such formal disputes, including triggering events and timeframes for action. For example, increasingly, lawyers are suggesting including a "Progressive Dispute Resolution Procedure" in agreements they help negotiate and execute. The major components suggested can include: 1. Good faith negotiations, preferably if possible, including involvement of a mutually trusted third party, or parties, as "Deal Counselor(s)" to help guide and manage the process; 2. Use of Deal Counselor(s), or trusted third party(ies), if not yet used as part of prior "good faith negotiations;" 3. Formal Mediation; 4. Arbitration; and, 5. Going to an appropriate Court. (Of note, many lawyers no longer favor inclusion of Arbitration in this procedure for reasons

mentioned below in Stage 6).

Stage 6
Utilization of dispute resolution methods that formal legal arrangements may **(should!)** provide for, as outlined above in Stage 5. Note that while arbitration is often specified for dispute resolution in legal arrangements, I do not think it as well suited to fostering party participation in resolving disputes as is mediation. With the increasing pressure by client companies to make arbitration more like litigation, I believe arbitration is an increasingly less desirable form of alternative dispute resolution (ADR) than is mediation. Some attorneys and clients argue that arbitration lacks the protections of the litigation process, so some prefer litigation to arbitration. In all circumstances, I favor a consensual method as a relationship preserving option over an adjudicative method. Using mediation techniques engenders the greatest likelihood of fostering improved long term relationships following resolution of a conflict or dispute.

Stage 7
Despite all attempts above, disputes remain unresolved and litigation ensues, including possibly litigation over whether litigation is even "allowed," depending upon provisions in the formal legal arrangements. (See, for example, ***JAMS Dispute Resolution Alert*** Summer 2008 Edition for discussion of *Hall Street Associates v. Mattel*, 128 S.Ct. 644 (Mar. 25, 2008)).

Stage 8
Litigation proceeds and perhaps there is a court ordered form of "ADR" or there may be a settlement arrived at before trial determination of the dispute.

Stage 9
All alternatives to litigation fail; trials, contested hearings, motions, and appeals proceed. Years go by before the dispute is resolved. At the Port Authority, despite efforts to minimize circumstances leading to litigation, we had our share of exhaustive, protracted litigation, but unfortunately it was sometimes viewed by the parties involved as "business as usual," particularly in larger scale developments. Even at this later Stage 9, after much money, time and emotional investment in the litigation process, it is not necessarily too late to consider using mediation techniques to try re-focusing on issues and to generate new options to resolve semi-hardened differences. Sometimes, when the parties involved recognize that the litigation process has taken on a life of its own that is not serving their interests, they are prone to consider mediator or deal counselor involvement. In government settings, sometimes a change in elected or appointed leadership may allow new faces to take a fresh look at what best meets the interests of the entities they represent. Similarly, in the private sector, executive changes can allow a fresh look leading to a renewed preference for deal making over continued litigation. As in prior Stages, here too use of a deal counselor or trusted third party would be helpful to refocus on arriving at a resolution involving the parties' direct participation versus waiting for a court to make a decision on a set of facts and law that may no longer be relevant, the same or compelling for one or more parties.

Stage 10
The resolution of the dispute(s) results in a termination or alteration of individual agreements while the business contacts and relationships and other agreements may continue. To foster preserving and nourishing these continuing arrangements that could be at risk in these circumstances, use of mediation techniques, mediation, or involvement of a deal counselor may be particularly well advised to forestall a total breakdown. With wider and more proactive reliance and use of mediation techniques and mediation in the prior nine Stages as indicated above, and here in Stage 10 too, hopefully one can avoid or at least minimize those situations resulting in total failure – when all agreements, contacts and relationships, by litigation or otherwise between the parties cease.

As outlined above, although not readily recognized in many cases, mediation and mediation techniques are and can be productively used at each stage of the above "negotiations and

deal making continuum." If so used, hopefully "Dispute Resolution" – Stages 6, 7, 8 and 9 above – which now receives the largest focused use of mediation, would diminish in size as many problems would have been dealt with proactively.

Such increased use of mediation and mediation techniques in the earlier stages of the continuum may diminish the number of conflicts and disputes that result in a need to resort to arbitration or litigation as the means to resolve them. I would expect this to occur because decisions and agreements arising from a mediation environment evolve with a maximum opportunity for party involvement, and collaboration in shaping the outcomes, versus in position-based negotiations, arbitration and litigation. Further, in my view as mentioned earlier, use of mediation techniques engenders the greatest likelihood of preserving longer term relationships – often critical in business activities – following the resolution of a conflict or dispute.

I will share a story about a $200 million "deal closing" after years of negotiation to illustrate that signing the document(s) is only part of the continuum. At the closing, one of the principals called in from overseas to try to "adjust" some terms. His call was literally coincident with execution of pre-prepared final documents. At the time, we joked that he was such a good negotiator, he continued to negotiate the deal "until the ink dried on his signature."

He understood that the signed contract was not really the end. It really was only the beginning of a new phase of the business relationship among the parties involved. The signed contract was a big thick set of documents to guide the parties' relationship, but without the concerted commitment by the involved parties to follow through, the contract really is just a pile of paper. (By the way, the project was built and is now viewed as a great success!)

In conclusion, astute deal negotiators and deal makers understand that the deal itself becomes a party to the transaction, with the other participating parties understanding at some level that consummating a deal that is not reasonably sensitive to the interests of each party to the deal is doomed to result in formal disputes and ultimate failure. Over the years, I found using mediation techniques to be far superior to hard negotiating tactics. Granted many of my experiences have been with larger, more complex transactions, but use of mediation techniques is possible in smaller deals too, even if using a formal mediator, or deal counselor, is thought not to be practical from a cost standpoint.

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