

THE ART OF THE DEAL

“Deal Mediation”

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At the ABA web teleconference "Deal Mediation: A New Use for an Old Friend" on February 6, 2008, the esteemed panelists [\[1\]](#) explored the uses of Deal mediation in the US. The issue of most concern was the difficulty in educating counsel and clients about the benefits of deal mediation and the pigeonholing of mediation as a litigation tool only. Numerous ideas and concepts were discussed as ways to overcome this bias and to further utilize the tools of mediation in a non-litigious context. [\[2\]](#) The comments in this article were discussed and explored.

Why is it that everyone knows that the traffic intersection in that part of town is dangerous, but the City doesn't put a stop light there until a child is killed? Once the uproar occurs, the political will to spend the money appears. Why is it that a teenager has to get stinking, filthy drunk before he discovers that alcohol is not so much fun, and that drinking in moderation is a wiser course? We all know we should eat healthier, exercise more, take a vacation, etc, but we don't do it. There is something in human nature that doesn't value preventative care and is more comfortable with crisis management. Why?

After over 20 years of deal making and thousands of negotiations I think it's because human beings are short-term gratification oriented. The stock market rewards quarterly increases, not long term planning. The CEO's compensation package rewards stock price increases so there is a natural predilection to achieve short term gains, rather than strategically planning for future long term growth. [\[3\]](#)

Great chess players never move one move at a time, they move five moves at a time in their head and can see the whole board *and* the end game. They also make a move designed to *provoke* a move from the other side that fits into *their* long term end game. [\[4\]](#)

Most negotiators move one puny move at a time. Great negotiators negotiate like great chess players, five moves at a time and take actions designed to provoke/ encourage a particular move from their opponent. They know that it is not the battle that must be won, but the war. Allowing your opponent to become overconfident, to become lax in their preparation or due diligence, might allow you to sacrifice one piece in order to gain something of much greater value and/or to position yourself for victory in the whole game.

This same philosophy applies to deal making negotiations. Often, the participants and/or their attorneys in a deal think:

“I can do this myself.”

“I don't need any outside help.”

“I don't want any outside influence.”

“I want to retain control.”

“I’ve negotiated many deals and don’t need a mediator”

In many instances, these statements and beliefs are accurate and true...*If* your opposing party in the deal negotiation has an alignment of interest with yours,...*If* he/she has either compatible or not incompatible negotiating styles and ...*If* they have an equal self-interest in closing a deal.

But what if these statements aren’t true? What if strong personalities get in the way? What if you hit a snag and one party wants to appear strong by walking out? Would you lose the deal simply because there wasn’t a third party there *driving* the negotiation? I’ve often been hired in deals after private negotiations failed and both parties will either be perplexed as to why it fell apart or hypothesize and come up with the wrong reason. As a third party with no skin in the game, a smart business deal mediator can find the correct reason and then come up with a fix.

If you don’t diagnose the correct problem, you can’t design a workable solution. In negotiation, parties are not fully forthcoming with each other so you may never know the real reason a deal works, falls apart, or becomes sluggish. Using a deal mediator, you gain insight into the tent of the other side that helps you avoid these pitfalls.

Interestingly, you can be harder and tougher in your own negotiating stance if you also don’t have to play conciliator or peacemaker and leave that job to an independent third party. Each party can concentrate on trying to achieve their own negotiation objectives without worrying that it will disrupt or destroy the negotiations because you can safely rely on the deal mediator to keep the game going.

If you have a deal mediator whose job and self-interest it is to keep the negotiations going, you can employ time-honored and excellent negotiation techniques such as good cop-bad cop, referrals to an outside approval mechanism, the walk away etc. You actually achieve greater control because you know you have a deal mediator there keeping the train on track for deal culmination.

As a mediator for over 20 years, and having conducted thousands of negotiations with tens of thousands of parties, I believe one thing emphatically, there is never only one “right”, and never only one “wrong”, there are only perspectives, personalities, and positions. [5] Take the exact same facts and change the human beings around the table, and you have an entirely different game. The proof for this supposition is to attend any negotiation simulation and have the same problem given to multiple groups of people and see all the different results that are achieved by the different negotiating teams. [6]

Furthermore, you never know what is going on inside the deep dark recesses of the “other” camp. There might be an IPO brewing, someone might be about to lose his job, be up for a promotion, have bad loss-to-gain ratios, have the imminent announcement of a new product or service, or the denial of a crucial governmental approval. All of which has nothing to do with the negotiation at hand factually, but may dramatically influence a desire or non-desire to culminate a negotiation. By using a *deal mediator*, someone with extensive mediation experience as well as sophisticated business acumen, you can avoid the trap of falling into the unknown of having no information or false information influencing your negotiating posture.

The trick is in hiring the right person. It can’t just be any old mediator or former judge. It has to be somebody with sophisticated people skills, well developed mediation and negotiation skills, sharp business acumen and a persistent personality. There are often unofficial outsiders in deals i.e. brokers, consultants, investment advisers etc. However, these folks don’t have mediation skills, are

tainted by perceived allegiance to one party and have their own self-interest that may make them impaired as deal makers.

Bringing in specific deal mediation talent at the onset of negotiations before things haven gotten off track, ensures that the negotiations will stay *on track* and the chances of a deal culminating dramatically increase. Furthermore, if an ongoing relationship is necessary between the principles after the deal closes, this ensures that there are no bruised egos or damaged personal relationships that have to be weathered post-closing.

Bringing all the resources you have to bolster your negotiating position should be a priority. If you can gain agreement from the other party to hire a deal mediator, the chances for success are improved. If the other party will not agree, still hire a deal mediator to work with your team. Her/his skills will still be useful. I've been hired by one party and during the negotiations, began working with their opponent, who began treating me as a confidant simply because I speak like a mediator. This enabled me to bring the deal to a successful culmination.

In short, using a deal mediator improves your negotiating position, improves your chances for a successful deal signing, and improves post deal relations between the parties. Wise negotiators anticipate using such talent in their transactions.

Hesha Abrams, Esq. is a nationally acclaimed attorney mediator and is known for crafting highly creative settlements in very difficult cases; over \$450 million in 2007 alone. She specializes in Intellectual Property matters and highly complex, emotional and/or political cases with an unique ability to manage difficult personalities and sensitivity to cultural nuances. For further information, see www.abramsmediation.com.

[1] The Esteem panelists included Michael Leathes, Executive Director, *International Mediation Institute*, The Hague, Netherlands; Joan Stearns Johnsen, as Chair, Mediator, West Newton, MA; Hesha Abrams, *Abrams Mediation & Negotiation, Inc.*, Dallas, TX; L. Michael Hager, President, *The Education for Employment Foundation*, Washington, DC; Jeswald W. Salacuse, Henry J. Braker Professor of Law, *Fletcher School of Law and Diplomacy, Tufts University*, Medford, MA

[2] For further information on the program or to secure a copy of the recorded program, contact Yolanda Muhammad at the American Bar Association Center for Continuing Legal Education, 321 N. Clark, Chicago, IL 60610, Phone: (312) 988-6118,

MuhammaY@staff.abanet.org, or the ABA web page, www.abanet.org/cle/home.html

[3] See Remarks by the Chairman of the Federal Reserve Board, Alan Greenspan on corporate governance at the Stern School of Business, New York University, New York, New York, March 26, 2002, <http://www.federalreserve.gov/BoardDocs/Speeches/2002/200203262/default.htm>,

also, Robert Reich's Blog, who was the 22nd Secretary of Labor for the US, entry dated February 1, 2007, "Bush on CEO Pay, and the Truth about CEO Pay",
<http://robertreich.blogspot.com/2007/02/bush-on-ceo-pay-and-truth-about-ceo-pay.html>

[4] Strategies for Chess Players and Other Warriors, By Brian Roche ,An *About Chess* guest article; June 2007.

[5] For more articles on this topic, see www.abramsmediation.com

[6] Richard J. Klimoski, *The Journal of Conflict Resolution*, Vol. 22, No. 1 (Mar., 1978