

An Introduction to Deal Mediation

L. Michael Hager

The first thing to know about deal mediation is that it is an extraordinarily valuable tool for lawyers and their clients. It can save negotiations that are doomed to failure for reasons of cultural difference, high emotion or a lack of orderly process. As a brand new lawyering skill, it can be an added source of income for the individual lawyer or law firm.

The second thing to know is that the biggest obstacle to the expanded use of deal mediation is the lawyer who sees it as a threat, rather than an opportunity. It took many years for lawyers to see Alternative Dispute Resolution (ADR) as a boon for their clients and a revenue earner for their firms. By shedding light on the little known opportunity of deal mediation, the ABA can speed the learning process and help make DM a new professional specialty.

The third thing to know about deal mediation is that it is not rocket science. Since it requires a "mediator personality" as defined below, the role of neutral is admittedly not for everybody. For those already engaged in the ADR field and experienced in commercial contract negotiation, expanding to deal mediation is a no-brainer. However, it is important to note that a deal mediator does not in any way supplant individual counsel for the parties. Hence all lawyers who negotiate business deals need to understand how they can select and use a lawyer neutral to improve their chances of success in complex, high value negotiations-- or even in more ordinary ones where the parties have widely different expectations.

What Is Deal Mediation?

To understand DM one has only to understand mediation in the context of dispute resolution. Parties to a contract dispute may first try to negotiate a resolution by themselves. Alas, they often fail, especially when human emotions and hidden agendas come in the way of a negotiated settlement.

A third party neutral, acceptable to both parties, can employ a number of effective mediation tools to help the parties resolve even the most intractable disputes or international conflicts. Unlike the arbitrator, the mediator does not decide, but can only lead the parties to understand how their mutual interests can be better met by an amicable settlement than by litigation or force of arms.

The mediator has a large tool box. He or she can: propose an orderly process for negotiating the dispute; help frame key issues; and hold separate "caucuses" with individual parties to vent emotions or vet ideas. The ADR mediator can facilitate plenary sessions with all the parties. By shifting from one meeting format to another, the mediator can orchestrate an ongoing brainstorming that will prompt creative problem-solving by the parties themselves. Thus in essence ADR is simply "assisted negotiation."

The Evolution of ADR to DM

Professor Roger Fisher of the Harvard Law School illuminated my path to ADR and eventually to deal mediation. Although my days as his student antedated by two decades his publication (with William

Ury) in 1981 of *Getting to Yes*, and although the book itself focused on negotiation, not mediation; his revolutionary theory of “win-win” provides a sound underpinning for both ADR and DM.

Among the first to view negotiation as other than a zero-sum game, Roger set forth four basic principles of interest-based negotiation:

- Separate people from the problem
- Focus on interests, not positions
- Invent options for mutual gain
- Use objective criteria.

I had an opportunity to appreciate the relevance of these principles to mediation when I began a practical study of ADR-- first at Professor Frank Sanders’ Mediation Workshop at Harvard and later at the Summer Program of the London-based Center for Dispute Resolution (CEDR). Of course these workshops like many others in the field of ADR confined themselves to dispute and conflict resolution.

From that point, it was simply a matter of linking Fisher’s negotiating methods as applied to both disputes and deals with the value-add of a neutral. I asked myself: if one can negotiate both to resolve disputes and reach agreements on fresh transactions and if mediation is merely “assisted negotiation,” why not bring in a lawyer neutral to help parties reach agreement on complicated or difficult contract negotiations?

As co-founder and Director (later Director General) of the International Development Law Organization (IDLO) in Rome, I visited Australia in 1998. While there I happened to meet with Robert Pritchard, a Sydney lawyer to whom I had been introduced on an earlier trip. When our conversation turned to ADR, I told him of my wish to write a law review piece on deal mediation, but that I hesitated to do so because I had never come across any lawyer who had done it. When Robert calmly but firmly interjected “I’ve done it,” I knew that I had found my writing partner. The result was “Deal Mediation: How ADR Techniques Can Help Achieve Durable Agreements in the Global Markets,” published as the lead article in the *ICSID Review Foreign Investment Law Journal* in the Spring, 1999 edition.

In the piece we focused on large, cross-border transactions which have a high percentage of negotiation failures. Robert’s two case studies are the centerpiece of the article. However, the case for deal mediation is equally relevant to any negotiation large and complicated enough to warrant the extra expense of engaging a lawyer neutral.

It is beyond the scope of this introduction to summarize the article. Suffice it to say here, the deal mediator should be a commercial lawyer with years of experience in representing parties in international transactions. Beyond active listening skills, dispassionate judgment and a deep reservoir of patience, he or she will be able to gauge whether the parties have realistic expectations of each other and to guide them to jointly assess and cope with their mutual business risks. “A successful deal mediator,” we contended, “can thereby help the parties achieve an enduring collaborative relationship.”