

The Art Of The Deal

“Deal Mediation”

By Hesha Abrams, Esq.
www.HeshaAbramsMediation.com

We all know 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 that 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 almost 30 years of deal making and thousands of negotiations I suggest that human beings respond from their limbic system-reptilian brain, which makes us hard wired to be 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.¹ One “aw shucks” wipes out five “atta-boy” in our social and business settings, penalizing risk takers and rewarding conformity.

Great chess players never move one move at a time, they move at least five-seven 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.²

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. There are often innocuous items that fit neatly into a larger game plan but only seem innocuous at the start before your strategy is revealed. Started early, you can position yourself to maximize your options, resources and negotiating position.

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.”

¹ 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>

² Strategies for Chess Players and Other Warriors, By Brian Roche, *An About Chess* guest article; June 2007.

“I want to retain control.”

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

In many instances, these statements and beliefs are accurate...*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,...*If* they have an equal self-interest in closing a deal,...*If* you have the correct advanced intel to know what’s going on in the other’s camp,...*If* you have the correct pressure points in the other’s armor.

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? What if your approach wasn’t target specific and it missed the mark? What if you don’t have the correct intel, or working under incorrect assumptions? Would you lose the deal simply because there wasn’t a third party there *driving* the negotiation? When called upon to enter a deal where negotiations have failed, I find that both parties will either be perplexed as to why it fell apart or hypothesize and come up with the wrong reasons. Since your insight into the other’s camp is necessarily limited, do you know what you don’t know? Ahhh, the Zen approach to deal making. It doesn’t work to fix the wrong problem. As a third party with no skin in the game, a smart business deal mediator can find the actual real or psychological reasons and then come up with a fix for the right problem to drive the process forward.

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, the “Columbo” approach, among others. 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 almost 25 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.³ 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.⁴

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

³ For more articles on this topic, see www.HeshaAbramsMediation.com

⁴ Richard J. Klimoski, *The Journal of Conflict Resolution*, Vol. 22, No. 1 (Mar., 1978)
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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't gotten off track, ensures that the negotiations will stay *on track* so that 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 as settlement counsel. Her/his skills will be invaluable. There have been times when I've been hired by one party as settlement counsel, but I still speak and act like a mediator, i.e. my tone and approach remain the same. Opposing parties divulge more than they otherwise would and want to treat me as a confidant simply because I speak like a mediator. This has been a valuable asset to the team working toward 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 strategically use such talent in their transactions.



Hesha Abrams, Esq. a nationally acclaimed attorney mediator for over 30 years, is known for crafting highly creative settlements in very difficult cases. She has created settlements worth over \$700 million in the past year alone. She specializes in creating innovative solutions for complex or difficult matters in Commercial, Intellectual Property and “Deal Mediation”, which is driving a complex business deal to successful signing. She has the unique ability to work with big egos and strong personalities. Hesha has successfully mediated for thousands of parties and was an innovator in the mediation field serving on the legislative task force that drafted the landmark Texas ADR law.

She mediates, consults, and negotiates on behalf of private parties throughout the country and internationally. She has worked in London, Hong Kong, Mexico, Thailand and India and with parties from all over the globe in complex patent licensing deals. She taught mediation and negotiation at the 2001 International Symposium on Negotiation and Conflict Resolution in The Hague. She was on the national panel for Dow Corning Implant cases and was the Chair of the Texas Bar Intellectual Property ADR Committee. She has been appointed Delegate to the Fifth Circuit Judicial Conference, 1988, 1990, 2002, speaker 2005, elected as a fellow of the Texas Bar Foundation in 2006 and received the Brutsché Award for Excellence in Mediation from the Association of Attorney Mediators.

For further information, see www.HeshaAbramsMediation.com.