Alternative 'Deal' Resolution: The Facilitated Negotiation of Transactions

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Introduction

Imagine you represent an American pharmaceutical company (“APC”) in their negotiations with a Chinese drug company (“CDC”) that has developed a promising new drug for the treatment of diabetes. The potential market share could exceed three billion dollars. APC’s most lucrative patent is about to expire and APC needs this joint venture with CDC to survive. CDC has been trying to break into the US market without success for years. Unknown to APC, CDC also needs this joint venture to survive. They need an infusion of capital and also need to establish an international market presence and good will.

The issues include royalties and equity investments by both companies; contingencies for failure to obtain government approvals; whether patent rights and ancillary rights would continue to be held by CDC or would be transferred to the joint venture, who would own any improvements, exclusivity for distribution, what markets to include in the joint venture and any forms of non-compete agreements, a determination as to who owns the rights to “off-label” indications, revenue targets and the implications of a failure to meet those targets, quality assurances and liability for lack of good manufacturing practices, choice of law issues, enforcement issues and an arbitration clause.

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The chief negotiators on both sides have serious problems understanding one another and not just because of the language problems. APC’s chief negotiator is direct, aggressive, and unapologetic. The Chinese negotiator is indirect and polite. He never shows emotion and never says “no.” To convey “no” he says “we will think about it” or “we will see.” His favorite tactic is to try to extend negotiations well beyond official deadlines to gain advantage. He will even reopen a negotiation on an issue after APC thinks they have a deal. This infuriates APC. The deal is in serious danger of falling apart for reasons unrelated to the merits of the deal. Who are you going to call?

This deal could be saved if the parties employed the services of a Deal Mediator or Deal Facilitator. Deal Mediation or Facilitation is the application of Alternative Dispute Resolution (“ADR”) principles to the negotiation of any kind of a transaction or other agreement, including for example joint ventures, licensing contracts, employment agreements, mergers and acquisitions. Essentially, it is the use of a third party neutral to assist with the negotiation of a transaction or contract at its inception. Deal Mediation is analogous to mediation in the much more common context of dispute resolution, i.e. the use of a third party neutral or mediator to assist litigators in the negotiation of the settlement of a dispute. Since the settlement of a dispute

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4 Generally, the concept of Deal Mediation or Deal Facilitation means the use of a third party neutral who assists the principals in the negotiation prior to the consummation of the deal. The neutral could be brought in at any stage in the negotiation. This concept is not specifically about resolving disputes arising from the deal, although an additional advantage of this process is that the neutral who assisted with the initial negotiation could be brought in to assist with any conflicts related to an ongoing relationship at any point in that relationship.
is in its essence a deal, Deal Mediation is a natural application of the principles of dispute resolution mediation to transactional practice.⁵

In precisely the way a third party neutral assists litigators in reaching agreement, a third party neutral can add tremendous value facilitating the negotiation of any deal or transaction at its inception. It is not unlike the “shuttle diplomacy” employed by various United States diplomats.⁶ But, acceptance is admittedly slow in coming. Professor Scott Peppet identified the possible benefits of a mediator in the context of transactions in his 2004 article “Contract Formation in Imperfect Markets: Should We Use Mediators in Deals?”⁷ Although awareness has grown especially among those who practice in the field of Alternative Dispute Resolution, transaction lawyers still are reluctant formally to embrace this concept.

ADR also initially encountered tremendous resistance. In 1976, Chief Justice Warren Burger invited Harvard Professor Frank E.A. Sander to present a paper on the future of alternative dispute resolution.⁸ Professor Sander introduced the “Multi-Door” concept in his paper “Varieties of Dispute Processing”⁹ It has taken more than thirty years, but it is now clear that there was more than a single way to resolve disputes. Today, litigators and their clients

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⁷ Peppet, supra note 4.
⁹ Id.
appreciate the value that a third party neutral adds to the resolution of a dispute. Lawyers negotiating transactions or deals would also derive a tremendous benefit from the use of a third party neutral. This is an obvious application of facilitated negotiation or as L. Michael Hager says in his 2007 Article “a no brainer.”

This article will examine this emerging area of Deal Mediation or Deal Facilitation. In his article, Professor Peppet focused on the value that a mediator can bring to the price discovery function of a deal. This article will identify other ways in which Deal Mediator’s could enhance the work of parties and agents in the negotiation of transactions. Part I will explore the particular set of skills as well as the psychological principles that enhance the value that a neutral brings to a negotiation. Part II will explore how Deal Mediation is particularly beneficial in a multi-national, multi-cultural context. Part III compares Deal Mediation and ADR and how the value added in the ADR context translates seamlessly into the context of transactions. Finally, this article will identify objections to Deal Mediation and compare them to the originally stated bases for opposition to mediation in the ADR context.

**Value Added with Deal Mediation**

The role of the Deal Mediator is analogous to that of the mediator in dispute resolution. In both situations, the objective is to determine sooner rather than later whether a deal is possible. When it is, the parties then seek to consummate it efficiently. Deal Mediators employ the same techniques as in settlement negotiations including 1) separating the people from the problem; 2) focusing on interests rather than positions; 3) “expanding the pie” and option generating; and 4) 

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relying on objective criteria. These techniques work well in all negotiations, including transactions. The third party neutral brings his or her expertise in negotiation theory and technique to add value to the deal negotiation process.

The chief differences in negotiating a deal as opposed to negotiating a settlement agreement is the fact that deals are less distributive than litigation settlement agreements. Even though there may be other ancillary issues to resolve, the greatest hurdle in negotiating a settlement agreement tends to be finding a mutually acceptable dollar amount. Transactions usually are not purely distributive; they contain multi-layered complex issues as well as interests of varying importance. Additionally, the best alternative to a negotiated litigation settlement agreement (“BATNA”) is often tied to the likely outcomes in court. In Deal Mediation of transactions, the BATNA or alternative to closing the deal more likely is walking away from the deal. Further, unlike in the settlement of a lawsuit, relationships are not ending, but are beginning.

Significantly, these differences between Deal Mediation and ADR Mediation actually mitigate in favor of the use of a third party neutral in transactions even more than in litigation settlements. The negotiation of a transaction is in many ways more problematic and complex

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15 See Peppet, supra note 4 at 296.
17 See Peppet, supra note 4, at 296.
18 FISHER & URY, supra note 13, at 101.
20 Hager & Pritchard, supra note 2.
21 See Phyllis E. Bernard, The Lawyer’s Mind: Why a Twenty-First Century Legal Practice Will Not Thrive Using Nineteenth Century Thinking (With Thanks to George Lakoff), 25 OHIO ST. J. ON DISP. RESOL. 165, 187 (2010) (discussing that the “deal” is the relationship between the two parties, and not what is written on paper at the conclusion of the negotiation).
than that of the settlement of a dispute. The Neutral Deal Facilitator or Deal Mediator helps parties navigate these difficult negotiations.

a) **Neutrality of the Third Party Facilitator**

A Third Party Neutral can add value in negotiating any type of contract or deal. A neutral can facilitate these negotiations even though the parties in interest are represented by skilled counsel or another type of agent or representative whose role in a negotiation is comparable to that of a litigator in a settlement negotiation.

Currently, in most transactions the parties and their agents engage in direct negotiation to hammer out the terms of the deal.\(^22\) This is true regardless of the complexity of the deal. For large, complex, multi-party, multi-national, negotiations, parties handle the negotiation in-house or rely on the advice and assistance of their respective agents. These agents are usually consultants, advisors, or brokers.\(^23\) Lawyers and investment bankers routinely serve this function.

These individuals as party representatives are compensated by a single side of the deal. A lawyer may be paid an hourly rate.\(^24\) Often an agent is paid a percentage of the deal or a success fee.\(^25\) Investment bankers may not be compensated at all should the deal fail to close.\(^26\) In addition to a monetary interest in the success of the deal as well as the amount of the deal, an agent also has a business interest in satisfying the needs of the client. An unhappy client is likely

\(^{22}\) See Peppet, *supra* note 4 at 289-90.


\(^{24}\) See *The Future of ADR, supra* note 9, at 6.

\(^{25}\) See Charles B. Craver, *Effective Legal Negotiation and Settlement* 8 (Matthew Bender & Co. 6th ed. 2009) (discussing how money may influence an attorney’s interest in settling, specifically if they are operating on a contingent fee basis and have bills coming due).

to find another agent for future business dealings. Therefore, agents have a personal interest in the deal—a stake in the outcome. They lack neutrality and consequently objectivity.

Certain agents are particularly skilled in negotiation theory and technique. They may even employ interest based, cooperative negotiation techniques and understand how to deal strategically with various negotiation styles successfully. This type of agent occasionally serves as an unofficial “mediator” to the deal. This type of agent has the skills to keep a deal moving forward and avoid the dangers of miscommunication and impasse. But even in these cases with exceptional skills, the agent cannot actually serve two masters ethically or psychologically. The agent may act with apparent neutrality, but lacks actual neutrality. The Neutral not only is someone with a particular skill set, but also someone who can apply these techniques in an evenhanded manner to serve the interests of the deal rather than those of any party in interest.

As someone acting on behalf of a party-in-interest, an agent will be subject to the same psychological influences as his or her principal. Certain of these psychological factors would have an impact on the agent’s ability to evaluate proposals and counterproposals. These factors include for example self-serving bias, endowment effect, or optimistic overconfidence.

27 See Phyllis E. Bernard, supra note 20, at 173 (stating that attorneys, though “wise” may not think in a manner that is “value neutral.”).
Other psychological factors would impair the agent’s effectiveness in persuading his or her counterparty. These factors include such principles as reactive devaluation, construal biases, and fundamental attribution error.

In contrast to the agent, a Deal Mediator is by definition a neutral with no stake in the outcome. (S)he is selected jointly with agreement of all of the parties. He or she is compensated by all parties equally. Generally, the neutral is compensated on a deal basis or some other formula unrelated to the success of the deal. In Deal Mediation, there are occasions where a neutral may receive a success fee, but this would be based on a formula unrelated to a benefit to be derived by one side over another and would be paid by both sides equally. Unlike an investment banker, the neutral is not engaged by and does not participate in the size or success of the deal on behalf of a particular party. In direct contrast to an agent, the neutral has a duty of loyalty and fair dealing to all parties equally.

As a neutral, The Deal Mediator or Facilitator is better positioned to avoid the psychological factors that would influence interested parties. He or she would seek objectivity

\[\text{\cite{ Birke, supra note 28, at 512-16.}}\]
\[\text{\cite{Russell Korobkin & Chris Guthrie, Psychological Barriers to Litigation Settlement: An Experimental Approach, 93 MICH L. REV. 107, 110 (1994) (explaining that reactive devaluation can be implicated when addressing settlement rates. “People do not like to do things their adversaries want them to do. Therefore, a settlement offer that a litigant would evaluate favorably in the abstract or when suggested by an ally or neutral third party is more likely to meet with disfavor when proposed by the adversary.”); Neuroscience and Settlement, supra note 28, at 497 (defining construal biases as when “people think that others hold more extreme views than they do, and are unwilling to accept that others are generally moderates in partisan situation); Robert S. Adler, Flawed Thinking: Addressing Decision Biases in Negotiation, 20 OHIO ST. J. ON DISP. RESOL. 683, 721 (2005) (defining fundamental attribution error as drawing conclusions about an individual’s character without considering other plausible explanations for their conduct).}}\]
\[\text{\cite{Sara Cobb & Janet Rifkin, Practice and Paradox: Deconstructing Neutrality in Mediation, 16 LAW & SOC. INQUIRY 35, 43 (1991).}}\]
that the Parties could not.\textsuperscript{35} The Neutral would have no incentive to obtain any specific terms or benefit to any particular party over any other. For that reason and because the Deal Mediator is selected by all Parties, the Deal Mediator would enjoy the trust of all. As such the Deal Mediator would be positioned to engage in reality testing as to proposals or positions. The Neutral also would be able to make his or her own proposals without those proposals being subjected to heightened scrutiny and mistrust.\textsuperscript{36}

As a neutral with no stake in the outcome, the Deal Mediator will be able to evaluate and communicate proposals with impartiality and objectivity. The Deal Mediator facilitates communication, builds relationships, engages in reality testing, identifies submerged interests, assists in option generating, and manages expectations without favoring one side over another. The Neutral enjoys the trust and confidence of all. The Deal Mediator is neutral—a representative to all and to none.

\textbf{a) Value from Building Relationships in Transactions}

Another way in which a Third Party Neutral can add tremendous value to the negotiation of a transaction is through relationship building. Deal Mediation takes place as the relationship between the parties in interest is forming or continuing. In dispute resolution, only occasionally is it important to try to salvage the relationship between the parties. Especially in commercial dispute resolution, preserving relationships is rarely a priority or even possible. Neutrals can use their skills in facilitating communication and relationship building to great advantage when negotiating a merger, joint venture, or employment contract.

Deal Mediators were able to repair a damaged relationship, repair hurt feelings, and ultimately make the difference in the 2007 contract negotiation of the Yankee baseball player, \textsuperscript{35} Evan M. Rock, \textit{Note, Mindfulness Mediation, the Cultivation of Awareness, Mediator Neutrality, and the Possibility of Justice}, 6 CARDOZO J. CONFLICT RESOL. 347, 348 (2005).  
\textsuperscript{36} \textit{Id.} at 347-48.
Alex Rodriguez. *The New York Times* reported that negotiations had broken down between the ballplayer and owner George Steinbrenner. Rodriguez’ agent Scott Boras had taken a tough negotiating stance that had alienated Steinbrenner. Two Goldman Sachs bankers who were known by both Steinbrenner or Rodriguez and who had no stake in the outcome acted as intermediaries and successfully closed the deal.\(^{37}\)

The Deal Mediators were able to overcome damage that had occurred in the relationship, uncover underlying interests and resurrect a deal that had reached impasse in this employment contract dispute between Yankee’s owner George Steinbrenner and Alex Rodriguez. Famously during the 2007 World Series an announcer reported that that Rodriguez was going to exercise an opt-out provision of his contract with the Yankees and become a free agent.\(^{38}\) Steinbrenner had stated that he would not negotiate with Rodriguez were he to opt out. The stalemate had arisen after Rodriguez agent Scott Boras had made very large demands on Yankee management. He demanded that the Yankees begin discussions with a $350 million dollar offer. This demand had been rejected.

The stalemate resulted from perceived insults on both sides. Both sides believed the other side was not interested in maintaining their relationship. Although this was the public position of both sides, their underlying interests were aligned. Rodriguez who had been born in New York and his wife preferred to remain in New York with the Yankees, and the Yankees’ owner, George Steinbrenner wanted to keep Alex Rodriguez who was on the verge of breaking a home run record on the Yankees’ lineup.

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\(^{38}\) Curry & Tyler Kepner, *supra* note 36.
Rodriguez reached out to Warren Buffet who suggested that Rodriguez contact Goldman Sachs managing directors John Mallory and Gerald Cardinale. John Mallory had a relationship with the Yankees and also knew Buffet and Rodriguez.39 It was in the interest of both Rodriguez and Steinbrenner to agree on a new contract. The position each took was inconsistent with those interests. The third party neutrals were able to work past these stated positions and reach agreement. These “deal mediators” were able to neutralize the personal conflicts and hard feelings caused by the clash of the various personalities involved.

The Goldman Sacks bankers were able to act as neutral intermediaries and repair the damaged relationship. Rodriguez signed a ten year $275 million dollar contract with the Yankees. The contract also contained bonuses and incentives related in part to the anticipated breaking of a major home run record. Learning of Rodriguez desire to remain a Yankee appeared to have mattered to owner George Steinbrenner who noted publicly that Rodriguez had accepted less money than he would have made as a free agent. Steinbrenner went on to say “Trust me, he would have gotten probably more. He is making a sacrifice to be a Yankee, there’s no question…. He showed what was really in his heart and what he really wanted.” 40 Both parties got what they wanted. Absent the intervention of the trusted neutrals, neither side would have been able to overcome the hurt feelings that interfered with their business relationship.41

In his article, “Mediation in International Business,” Jeswald Salacuse discusses a negotiation between Matsushita Electric Industrial Company of Japan and MCA, the entertainment conglomerate.42 The parties engaged Michael Ovitz, a Hollywood powerbroker,

42 Salacuse, *supra* note 22.
to assist them in the acquisition of MCA by Matsushita in 1991. Although Ovitz was engaged by Matsushita, he acted as more of a neutral and “at one point in the discussions, he moved constantly between the Japanese team of executives in one suite of offices in New York City and the MCA team in another building, a process which one observer described as “shuttle diplomacy.””

Ovitz intentionally kept the parties apart as a means of avoiding conflict due to the significant cultural differences and contrasts in negotiation style. The American businessmen were direct “low culture” negotiators. The Japanese are from a “high culture” and tended to rely on consensus building. Rather than try to help the parties navigate their differences, Ovitz chose to focus on closing the deal. He fell short, however. The parties reached agreement on a number of significant deal points, but could not agree on price.

At this point, Matsushita and MCA jointly engaged a powerful, well respected attorney, Robert Strauss. Strauss had also served as U.S. Trade Representative and U.S. Ambassador to the Soviet Union. Robert Strauss was respected by both sides and was brought in because he had the trust of both sides. In his position as neutral, Strauss was able to understand the needs and interests of both sides and eventually help the parties reach agreement and consummate the deal.

Although the deal closed, there continued to be issues and the merger was not a successful one. Professor Salacuse posits in his article whether Ovitz’s failure to address the issue of relationship building ultimately contributed to the failure of the merger:

One may ask whether Ovitz’ strategy of keeping the two sides apart during negotiations so that they did not come to know one another contributed to this unfortunate result. It prevented the two sides from truly understanding the vast gulf which separated them and therefore from realizing the enormity and perhaps impossibility of the task of merging two such different organizations into a single coordinated and profitable enterprise.44

43 Id.
44 Id.
The Deal Mediator or Third Party Neutral can help to not only close the deal, but can also help keep the deal together and work through problems that may arise in the course of the relationship. It would be especially beneficial to have the same neutral who assisted in putting the deal together in the first place help resolve conflicts that may arise in the course of the relationship. Through the use of relationship building, communication, facilitation, and creative option generating, the third party neutral can help the parties avoid the necessity of a lawsuit to resolve problems in a joint venture, employment relationship, or other ongoing relationship.

Often, in transactions, the relationship between the parties in interest is paramount. A third party neutral can assist parties in building a relationship as they entering into a merger, joint venture, or employment contract. This may involve engaging in specially selected exercises, managing communication and culture differences, or encouraging the parties to “break bread.” Without a working relationship involving mutual respect and trust, it is unlikely that the parties will consummate a deal between them. If they do consummate the deal without the requisite relationship, the ongoing business venture may suffer. Because of his or her ability to assist the parties in establishing a good working relationship, the Deal Mediator can add tremendous value to the deal.

b) Value from Negotiation Coaching: Managing Conflicting Negotiation Styles

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45 Schonewille & Fox, supra note 2, at 98-99.
46 See CRAVER, supra note 24, at 12 (Matthew Bender & Co. 6th ed. 2009) (discussing how the most successful negotiators are ones who “behave in an honest and ethical manner, are perceptive readers of opponent cues, are analytical, realistic, and convincing, and observe the customs and courtesies of the bar.”).
47 See Schonewille & Fox, supra note 2, at 84. (discussing how commercial negotiations may end with incomplete or non-preferential outcomes caused by factors such as impediments between parties, cognitive barriers, and miscommunication between negotiators); Bernard, supra note 20, at 188 (discussing how an attorney orchestrates a meeting to confirm “perceptions, successes and concerns” even if the deal appears sound, because an incident could still arise).
Another common problem is conflicting negotiating styles. This may arise due to cultural differences in international negotiations, but are common in all negotiations. Among the most common negotiation styles are: 1) competitive, or positional bargainers; 2) soft bargainers; and 3) cooperative or interest based negotiators.48

Competitive negotiators usually adopt an aggressive, confrontational posture. They tend to focus on the size and the patterns of concessions they are able to elicit from the other side.49 They measure their success by the concessions they elicit from their adversaries.

Soft bargainers have little regard for the ritual of negotiation. They use a style also known as Boulwareism.50 They seek “cut to the chase,” and avoid a protracted auction, i.e. the price discovery function of back and forth exchanges of offers and demands.51 They make what they consider to be a fair and reasonable offer as their first, last, and basically final offer and expect the other side to recognize it as fair and reasonable and accept.52

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48 Positional bargaining is defined as a method in which the “negotiators stake out bargaining positions. Negotiation consists of one or more moves and countermoves in which the parties may grant concessions to the other party and seek agreement by the reciprocal exchange of positions until an agreement is reached or the matter is resolved in some other way.” Milton Heumann & Jonathan Hyman, "Negotiation Methods and Litigation Settlement Methods in New Jersey: “You Can’t Always Get What You Want”, 12 OHIO ST. J. ON DISP. RESOL. 253, 254 (1997). Soft bargainers are “likely to overmatch and concede early without exploring the full range of options.” Christine Rack, Negotiated Justice: Gender & Ethnic Minority Bargaining Patterns in the Metro Court Study, 20 HAMLINE J. PUB. L. & POL’Y 211, 221 (1999). Cooperative bargainers focus on interests as opposed to positions, and try to “see the situation as the other side sees it.” Robert J. Condl, Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role, 51 MD. L. REV. 1, 23 (1992).

49 Heumann & Hyman, supra note 47, at 254.

50 Ed Garvey, Foreword to The Scope of the Labor Exemption in Professional Sports: A Perspective on Collective Bargaining in the NFL, 1989 DUKE L.J. 328, n. 37 (1989) (referencing how the GE vice-president Lemuel Boulware implemented a strategy appealing directly to union members and the public, circumventing the union leaders).

51 Charles Craver, Active Legal Negotiation and Settlement, ALI-ABA COURSE OF STUDY MATERIALS (1983).

52 Id.
The party on the receiving end of a soft negotiator’s offer rarely recognizes even the most reasonable of offers as acceptable because they find the process unfair and the result imposed upon them rather than bargained for.53

A third type of negotiator is the cooperative or interest based negotiator. This is the style of negotiation most often taught today, and the one espoused in Getting to Yes.54 It is based on the principles of separating the people from the problem; focusing on interests rather than positions; relying on objective criteria; and creative option generating.55 Many still resist this style of negotiation based on the mistaken belief that cooperative negotiation is synonymous with weakness or concession.56

Sometimes these styles match up and other times they do not. The Neutral can coach the competitive bargainer to rely on objective criteria as a powerful alternative to positional bargaining. These criteria are objective and provide an excellent alternative to screaming the loudest for the longest. Some negotiators may be too “thin skinned” and too quick to take offense. The Neutral can deliver offers in a manner that diminishes the impact and coach the soft negotiators on appropriate re-anchoring57 and countering.58

The client may be controlling and want to dictate the approach to the negotiation which is a problem when the other side is unwilling to “comply.” With this difficult dynamic a third party

53 Id.
54 FISHER & URY, supra note 13.
55 Condlin, supra note 47, at 23.
56 See CRAVER, supra note 24, at 11 (stating that through the practice and teaching of legal negotiating, cooperative/problem-solving negotiators have never been less effective than competitive negotiators, despite the notion that one must be “uncooperative, selfish, manipulative . . . and abrasive.”).
57 See id. at 301 (addressing how individuals often “lock” themselves into principled positions without considering alternatives, and how a mediator can enable an individual to re-evaluate underlying interests and proposals being offered).
Neutral is uniquely positioned to protect this difficult client from himself or herself. The Neutral can run interference keep a possibly explosive negotiation style from derailing the negotiation.\textsuperscript{59} An additional advantage to employing a third party Neutral is that each party can take more extreme positions and engage in more vigorous price discovery negotiation with the knowledge that (s)he will provide objective feedback as to more extreme positions,\textsuperscript{60} engage in negotiation coaching\textsuperscript{61} and counsel a party on how a particular proposal will be likely to be received. This frees the party to “test the waters” with demands that might or might not be perceived as extreme by the other side.

The Neutral also will have the skill to present these demands and offers in a manner that will manage negative and possibly explosive reactions from the other side. (S)he can soften the message when communicating a particularly inflammatory proposal and keep the parties at the table. The Neutral serves as a “backstop” permitting the safe exploration of extreme positions while moving the entire negotiation forward.

\section*{II. Deal Mediation in Large, Complex, International Transactions}

Although a mediator can add value in any situation, the most difficult, complex negotiations would benefit most from the presence of a Neutral. The Neutral can be expressly selected because that individual not only enjoys the trust of all the parties, but because also possesses a particular expertise. The Deal Mediator is best positioned to have the perspective, understanding, and skills necessary to assist the parties in the most problematic negotiations.

\begin{enumerate}
\item \textbf{a) Value Added in International, Cross-Cultural Negotiations}
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\textsuperscript{59} See Rack, \textit{supra} note 47, at 215-16 (discussing how mediators can “reframe positional arguments into statements of interests, to divert blame, accusations and defense . . . and to generally encourage parties.”).


Many deals today involve cross-border negotiations. Approximately thirty-six of the world’s top fifty industrial corporations have their headquarters located outside of the United States. Further, the development of technology, and the enhancement of transportation and communication “have made international business the ‘most significant, ever-growing, and predominate aspect of the modern world.’”

There are many reasons why in some circumstances direct negotiation of cross-border agreements may fail. Negotiations frequently fail for reasons having nothing to do with whether or not the joint venture, merger, or licensing agreement might actually be beneficial to all parties. Complexities that may impede agreement in meritorious deals are the dynamics of the individuals involved in the negotiation, miscommunication, misunderstandings as to positions and interests, multiple complex terms, constituencies, and multiple parties. These complexities are even more common in the international context where meaningful communication is frustrated by language barriers as well as cultural conflicts.

In any negotiation the focus of a neutral will include facilitating communication, managing difficult dynamics, and navigating delicate cultural differences. Even when parties are from the same country and speak the same language, there are often issues below the surface that result in misunderstandings. In cross-cultural negotiations, these issues are exacerbated. Helping parties avoid these language and cultural disconnects is value that the neutral facilitator can “bring to the table.”

62 Bernard, supra note 20, at 187.
64 Id. at 3-4 (quoting Abbass Alkhafeji, What a Small World After All, in 1 INTERNATIONAL RESEARCH IN THE BUSINESS DISCIPLINES-THE DILEMMA OF GLOBALIZATION: EMERGING STRATEGIC CONCERNS IN INTERNATIONAL BUSINESS 5, 6 (Carl L. Swanson ed., 1993)).
65 Schonewille & Fox, supra note 2, at 83.
66 See Bernard, supra note 20, at 180.
Understanding emotion, personalities, and dynamics is important in all negotiations, especially, cross-cultural ones.\textsuperscript{67} Once the personal issues are identified, they can be addressed and diffused. The mediator will seek to understand who the principles are and to understand what they mean by what they say. Is someone merely posturing or is that person really likely to walk away? How much trust exists and how well are the parties communicating? How does one side perceive the tactics of the other side? Parties will act contrary to their own best self interest to the extent they believe they are not being heard or are not being treated fairly.\textsuperscript{68}

In any negotiation, the first step is to understand who the parties are. The next step is to make sure that who they are is not an impediment to what they want. A third party neutral can be quite helpful in separating out what one side means from what they say.\textsuperscript{69} It is not unusual for messages to be intended to be heard a certain way, but misperceived by the listener.\textsuperscript{70} Emotions can cloud the ability to send a message as well as receive it clearly. In a negotiation it is not uncommon for one side to misperceive frustration as anger or the constraints imposed by various constituencies as unreasonableness or intransigence.\textsuperscript{71} The Third Party Neutral can explain not only the terms but also the underlying rationale. He or she will diffuse the personal issues in order to maintain focus on the negotiation.

\textsuperscript{67} See Barker, \textit{supra} note 62, at 8-9 (discussing how mediation in an international setting is beneficial because it can address issues such as “intangible feelings, personal interests, and emotional concerns” that may arise due to parties’ principles and interests as opposed to bargaining positions).

\textsuperscript{68} Welsh, \textit{supra} note 27, at 753.

\textsuperscript{69} See Bernard, \textit{supra} note 20, at 186-86 (stating that value can be created when an attorney applies ADR skills to resolve conflicts arising from miscommunications based on corporate and cultural issues).

\textsuperscript{70} In an international negotiation, this is considered cross-cultural miscommunication. It occurs when one individual misinterprets the message communicated by an individual from another culture. Cross-cultural miscommunication is one of the leading causes of international negotiation failure. See Barker, \textit{supra} note 62, at 18-19.

\textsuperscript{71} Id. at 11 (discussing how a mediator develops a procedure that “encourages emotional expression without destructive venting.”).
To succeed, the negotiators should focus on problem solving to avoid being distracted by personal dynamics or emotion.\textsuperscript{72} All negotiations, regardless of the complexity or dollar amount are personal transactions engaged in by individuals.\textsuperscript{73} The neutral can break through language and cultural barriers to identify actual interpersonal issues.

The most obvious problems in international negotiations are caused by language barriers. Translation is not a straightforward issue.\textsuperscript{74} Often nuance and context can be lost.\textsuperscript{75} Ideally the third party neutral could be selected because of his or her facility with the languages spoken by all parties. However, even if the mediator is not fluent in all of the languages, he or she will nevertheless be sensitive to these issues and capable of avoiding misunderstandings arising from working with translators.\textsuperscript{76}

Clashing cultures adds an additional layer of complexity.\textsuperscript{77} Cultural differences can be as obvious as in the differences in handshakes or acceptable business attire, or they may be subtle. For example, there are low and high context cultures.\textsuperscript{78} This terminology refers to the extent from which the meaning of communication comes from the surrounding context, as opposed to

\textsuperscript{72} See David P. Hoffer, Note, \textit{Decision Analysis as a Mediator's Tool}, 1 HARV. NEG. REV. 113, 124 (1996) (discussing how parties can become emotionally involved in a case and how a mediator can be used to move the negotiation beyond the emotional issues and toward a resolution).

\textsuperscript{73} See CRAVER, \textit{supra} note 24, at 5 (stating that negotiations are influenced by the same “psychological, sociological, and communicational factors that affect all interpersonal transactions.”).


\textsuperscript{75} Id.

\textsuperscript{76} The use of translators does not necessarily remedy all international communication issues. The text in the original language may not allow for an exact translation. Further, text may be misunderstood by the translator and mistakes not recognized by someone with no knowledge of the subject matter which he is translating. \textit{Id.} (referencing Eric E. Bergsten & Anthony J. Miller, \textit{The Remedy of Reduction of Price}, 27 AM. J. COMP. L. 255, 276 (1979)).


\textsuperscript{78} Id. at 291.
what is said directly.\textsuperscript{79} The low cultures tend to be more direct.\textsuperscript{80} People in these cultures speak their mind and get to the point.\textsuperscript{81} High context cultures tend to be more indirect. They rely on context and a shared basis of experience for their communication.\textsuperscript{82} Often times, those from high context cultures do not need words to accompany a message, the “meaning of a communication is already ‘programmed’ into the receiver of the message.”\textsuperscript{83} These sorts of cultural differences influence the style in which business points are likely to be communicated. Conflicts of communication style can produce unintended results such as personal affronts which can derail the negotiation of an otherwise mutually beneficial business deal. One side may perceive the other side as disrespectful or rude when each side is merely adhering to accepted norms of their particular culture. These sorts of cultural differences can be especially problematic in the business context.

For example, in Mexico building of a relationship is a necessary element of a business negotiation.\textsuperscript{84} The natural tendency of an American negotiator to be more direct and to want to dispel with matters unrelated to the deal at hand may be perceived as aggressive and rude and result in distrust.\textsuperscript{85} The Americans tend to view the Mexican negotiators as lacking professionalism.\textsuperscript{86} The Deal Mediator would advise and assist the Parties so they can avoid these sorts of misperceptions.

A Deal Mediator skilled in negotiating international disputes will understand the cultural differences and guide both sides through this potential minefield. Deal Mediators advise the

\textsuperscript{79} Id. at 298.
\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} Baker, supra note 62, at 35.
\textsuperscript{85} Id.
\textsuperscript{86} Id.
parties on the relevant cultural norms; he or she can assist in translating style and custom as well as language. In addition to facilitating the negotiation, the Deal Mediator facilitates communication. In the course of a negotiation, there are many conflicts that although not directly attributable to the merits of the deal could produce an impasse and prevent the consummation of the deal. 87 Some of these issues are illustrated by two examples discussed in L. Michael Hager and Robert Pritchard’s article “Deal Mediation: How ADR Techniques Can Achieve Durable Agreements in the Global Markets.” Hager and Pritchard discuss the value added by the presence of a third party neutral in complex, multi-party, multi-cultural negotiations.88

Hager and Pritchard report on an international joint venture between a Canadian company and a Japanese company. The Canadian company and the Japanese company desired to invest jointly in New Zealand. Although the parties were able to agree upon terms, cultural differences threatened to kill the deal. The Japanese negotiation team needed the consensus of its internal finance department. The finance department could not give its approval until the specific expenditures had been approved in the annual budget. This presented the Japanese with a classic “Catch 22.”

This problem was exacerbated by the fact that it would have been an enormous breach of propriety to inform the Canadians of the source of the delays which was preventing them from closing on the deal. These delays and the lack of an explanation engendered by the Japanese company’s need to obtain this internal approval created a feeling of mistrust on the part of the Canadians who began to issue ultimatums. The ultimatums exacerbated the situation for the Japanese whose culture required the building of this internal consensus and prevented them from disclosing the precise nature of these internal problems with the Canadians.

87 See e.g., FISHER & URY, supra note 13, at 11 (discussing how emotions can interfere with a negotiation).
88 Hager & Pritchard, supra note 2.
The parties engaged a third party neutral who in this instance was from the third country, New Zealand. The Japanese negotiators were able to confide their problem to the neutral. With this knowledge, he was able to fashion a creative option that allowed the Japanese team to proceed. The deal closed and the joint venture proceeded successfully. The Canadian team never learned the nature of the actual obstacle and the Japanese team saved “face.” The third party neutral was able to navigate the cultural disconnects. These differences in culture and negotiating styles would have dead-locked the negotiation had the parties not engaged the third party neutral.

A Deal Facilitator is selected by the parties based on a particular set of skills or experience. In the case of an international negotiation, the neutral may be selected because in addition to negotiation and mediation skills, the neutral also speaks the requisite languages and understands the various cultures in addition to possessing the requisite negotiation skills and subject matter expertise. A third party neutral can add tremendous value in cross-border deal negotiations.

b) Managing Multi-Party, Multi-Issue, Complex Negotiations

In most mediations involving commercial disputes, the negotiation is distributive, that is the negotiation is largely a single issue – money.\(^{89}\) In transactions, there are usually more issues to be considered. An advantage of the presence of the third party neutral is the ability to manage complex multi-issue negotiations. The neutral can help both sides identify their respective underlying interests and the relative priorities and uncover overlaps and opportunities for agreement.\(^{90}\)

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90 See CRAVER, supra note 24, at 300-01.
Parties may or may not be aware of their own submerged interests and those of their opponent. They may require guidance to determine the order of priority of these interests. It is not unusual for the parties to fail to explore their own underlying interests beyond the positions taken in negotiation. The mediator can assist both sides in identifying what they need as opposed to what they want. This exercise can reveal opportunities for mutual gain.\textsuperscript{91} A neutral would be able to help the parties brainstorm solutions based on those interests either separately or together.\textsuperscript{92}

Failure to reach agreement on terms can result from a failure to understand not only what a party offers or demands, but what the party would be willing ultimately to accept. Often parties fail thoroughly to explore their own true reservation point.\textsuperscript{93} Even more often they overlook this part of the analysis as it applies to their opponent.\textsuperscript{94} Option generating presents an opportunity to be creative. Sometimes there are ways to change the dialogue and to find additional ways to “expand the pie” and bring value to both sides of the negotiation.\textsuperscript{95} It is not uncommon for a neutral to identify shared and compatible interests unknown to the parties.\textsuperscript{96}

Creative option generating, and exploring submerged interests may be potentially dangerous when handled directly by the parties.\textsuperscript{97} When handled by a third party neutral,

\begin{footnotesize}
\textsuperscript{91} See Alex Grzybowski et al., Beyond International Water Law: Successful Agreements for International Watercourses, 22 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 139, 143 (2010); see generally, Jeremy Richler, From Both Sides of the Table: The Art of Balancing Negotiation, 21 WINDSOR REV. LEGAL & SOC. ISSUES 11, 14-15 (2006) (discussing how framing exercises can introduce beneficial options).

\textsuperscript{92} Harold Abrahmson, Problem Solving Advocacy in Mediation: A Model of Client Representation, 10 HARV. NEG. L. REV. 103, 110 (2005); Psychological Impediments, supra note 27, at 295-97.

\textsuperscript{93} See FISHER & URY, supra note 13, at 101-03 (addressing how parties may pick a bottom line which can prevent them from inventing a more acceptable alternative).

\textsuperscript{94} Id. at 61-66 (addressing how parties may pick a bottom line which can prevent them from inventing a more acceptable alternative).

\textsuperscript{95} Id. at 60-66.

\textsuperscript{96} Id. at 42.

\textsuperscript{97} Dr. Luis Miguel Diaz & Nancy Oretskin, Mediation Furthers the Principles of Transparency and Cooperation to Solve Disputes in the NAFTA Free Trade Area, 30 DENV. J. INT’L. & POL’Y 73, 73 (2001).
\end{footnotesize}
whether in joint session or in private caucus, these creative options can be explored, reality tested, and safely presented to the other side.98

An example of how a Deal Mediator can add value is in cases of the negotiation of multi-party, complex transactions.99 The transaction described in Hager and Pritchard’s article, involved the negotiation of a major power generation project. On the merits, the deal benefitted all concerned. A former command economy wanted to exploit its recently discovered supply of natural gas and improve its energy infrastructure. A private sector consortium wanted to build operate and transfer (“BOT”) a gas-fired power generator. The host country would pay the expenses and supply the natural gas. The private consortium would transfer the generator back to the host country after a guaranteed return had been realized. Everyone stood to gain yet the negotiation stalled and looked like it would fail.

The negotiations involved multiple countries and multiple parties. The host country had three separate ministries, finance, petroleum, and power all with competing interests and needs.100 The foreign consortium included the electricity utility, a construction company, plant supplier, equity investors and banks—as well as all of the representatives and lawyers.101 There were at least twenty people and no consistency of representation. The complexity of the logistics as well as miscommunication and misunderstandings threatened the deal in spite of its inherent merits.102 Misunderstandings devolved into mistrust and the negotiations reached impasse.103

99 Hager & Pritchard, supra note 2.
100 Id.
101 Id.
102 Id.
103 Id.
Then, one of the bankers proposed that the parties should bring in an intermediary in a last-ditch attempt to break the negotiating stalemate. The banker knew a lawyer with extensive experience in putting together major international projects who had worked in countries with different cultural traditions, different legal systems and different ways of doing business. The lawyer also had some ADR experience, having mediated large-scale contract disputes. The lawyer was recommended by the banker because he was considered to be cross-culturally sensitive and ethical. If such a person could win the confidence and trust of all of the parties, he could possibly mediate a bankable deal…

Using his ADR skills, the deal mediator assisted the officials of the three ministries to develop a consensus on a "whole of government" position. He also progressively built up the confidence and trust of all parties. By getting the parties talking realistically again, the stalemate was broken and issues were systematically resolved. Eventually a final agreement was brokered which was satisfactory to all parties.\footnote{Id.}

Absent the intervention of the Deal Mediator, it is unlikely that the parties could have overcome these problems. As a result they would have missed out on a valuable opportunity beneficial to all. The problems in this example were not with the deal, nor were they in some way caused by some inadequacy on the part of the parties or their representatives. The problems were a result of the complexity of the deal. Fortunately the parties recognized this. Their idea to seek a Deal Mediator saved the deal.

III. Comparison between Alternative Dispute Resolution and Deal Mediation

Using a Neutral to facilitate a negotiation demonstrably works. Yet change is difficult and takes time. There was enormous initial resistance to the use of a Neutral among litigators. It has taken more than thirty years to reach this point of widespread acceptance. Yet, even in the litigation context, there is still a ways to go before mediation is fully integrated into the culture throughout all practice areas and all geographical areas. Although the concept of Deal Mediation is self-evident to those who practice in the area, transaction lawyers remain skeptical.

a) Objections to Deal Mediation
Although, informally practiced for decades, the formal concept of Deal Mediation or Deal Facilitation has only been discussed for the past decade or so.\textsuperscript{105} Not surprisingly, investment bankers and transaction lawyers are raising the identical objections to deal mediation that litigators raised to alternative dispute resolution methods such as mediation. Not surprisingly many believe that they should continue to conduct negotiations the way they always have. In other words “if it ain’t broke, why fix it?”

However just as there are lawsuits that are more difficult to settle directly and which have benefited from the presence of a mediator, transactions would benefit from the presence of a mediator.

When the concept was introduced, it was met with enormous resistance.\textsuperscript{106} Litigators who had traditionally settled cases through the use of direct negotiation protested that there was no need to utilize third party neutrals. Why, it was thought, would clients need to pay someone to help them to do what their litigators had always done? However, the use of mediation proved to have a major impact on the numbers of cases resolved prior to litigation.\textsuperscript{107} Litigators discovered that the use of a third party neutral or mediator did help them reach lasting agreement in their negotiations.\textsuperscript{108}

\textsuperscript{105}Id.


\textsuperscript{107}Less than 1.8 percent of cases result in trials. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459 (2004) [hereinafter Vanishing Trial]; see Hoffer, supra note 71, at 114 (discussing the use of decision analysis as a means of structuring issues in a case and “determining settlement value and allocating resources before trial.”).

\textsuperscript{108}A study of civil cases handled by the U.S. Department of Justice from 1995-1998 revealed that 65 percent of cases settled when ADR was used, while 29 percent of cases settled when ADR was not used. “Study Shows ADR Helps Settle Cases, Save Time and Money”, *American Arbitration Association*, July 21, 2008, available at http://www.adr.org/sp.asp?id=34835 [hereinafter AAA].
The objections most often interposed included the concern that mediation would add to the cost of litigation. It was argued that mediation would only delay the process since it would add an additional step. In fact, the increase in mediation saves time and money.

A submerged, but no less important objection and a major impediment to the acceptance of mediation was the belief that mediation would hurt business in terms of billable hours and diminished value added.

Litigators feared their own importance to their client would suffer in the mediation context as opposed to when they conducted a direct negotiation. Clients would no longer need them. This was unfounded concern, and now, objectors are those who do not practice mediation. Litigators learned mediation advocacy and the techniques of working through with the mediator to achieve settlements that better address the clients’ needs and interests. Litigators need to advocate in the mediation context to assure the best result for their clients. After all “you don’t get what you deserve, you get what you negotiate.”

It is undisputed that settling a case will result in fewer billable hours than settling. With mediation more cases are resolved short of trial. However, mediation produces more settlements, more creative solutions, and more client participation in these settlements improves client satisfaction. This is achieved with tremendous cost savings for the client as well. With

110 Id.
111 Bingham et. al., supra note 105, at 252.
112 Peppet, supra note 4, at 323-24.
114 CRAVER, supra note 24.
115 DR. CHESTER KARASS, IN BUSINESS AS IN LIFE, YOU DON’T GET WHAT YOU DESERVE, YOU GET WHAT YOU NEGOTIATE (Stanford Street Press, 1996).
116 See The Future of ADR, supra note 9, at 9 (discussing how if an attorney earns a reputation as an effective negotiator, they will be used more).
mediation as opposed to either litigation or direct negotiation, clients play an enhanced role and retain ownership of the result which leads to a higher degree of satisfaction with the outcome than with litigation.\textsuperscript{117} While settling cases short of litigation does result in a loss of revenue in a particular case, the higher degree of client satisfaction ultimately leads to an increase in repeat business as well as referrals.\textsuperscript{118}

ADR has been integrated into the litigation culture. Now, those attorneys protesting are those who fail to utilize mediation.\textsuperscript{119} They appreciate the value added by the presence of the third party neutral in managing the personalities involved, the different negotiating styles, as well as varying expectations. They found the benefits far outweighed any disadvantages and mediation continues to grow in popularity in the litigation context.\textsuperscript{120}

Since the objections interposed by transaction lawyers mirror those of litigators, it seems reasonable to conclude that transaction lawyers will also learn the value that third party neutrals can bring to the negotiation of deals.

b) **Benefits From ADR Are Applicable To Transactional Practice**

Deal Mediation involves a third party neutral acceptable to all sides with no stake in the outcome. This use of neutral would increase the likelihood of the success of the negotiation; in other words, he or she increases the likelihood of a consummating a deal. Anecdotally, as high as fifty per cent of all investment banking deals fail through no fault of the deal. The use of a third

\begin{itemize}
  \item \textsuperscript{117} Id. at 6 (discussing how mediation results in a boom in an attorney’s business).
  \item \textsuperscript{118} See Id.
  \item \textsuperscript{119} Hoffman, supra note 12, at 117.
  \item \textsuperscript{120} See The Vanishing Trial, supra note 106, at 514 (discussing the decline of trials due to the development of ADR); Michael Moffitt, Islands, Vitamins, Salt, Germs: Four Visions of the Future of ADR in Law Schools (and a Data-Driven Snapshot of the Field Today), 25 OHIO ST. J. ON DISP. RESOL. 25, 31 (2010) (discussing the increase in law schools providing ADR courses to students).
\end{itemize}
party neutral will result in a higher percentage of deals closing.\textsuperscript{121} Clients expend considerable resources in terms of time and money engaging in due diligence and in the legal time and expense associated with the pursuit of a major deal.\textsuperscript{122} These resources are lost when the process ends without a positive result. A higher percentage of closed deals would have a direct impact on the bottom line of the Client. A higher degree of certainty and better negotiation results would result in tremendous savings for the client in terms of both time and money. A third party neutral would have a direct impact on these percentages of successful deals closed.\textsuperscript{123}

The field of alternative dispute resolution continues to grow. The Civil Justice Reform Act passed in 1990 encouraged federal district courts to develop ADR programs.\textsuperscript{124} In 1998 Congress passed the Alternative Dispute Resolution Act which formally authorized the use of ADR in civil and administrative proceedings.\textsuperscript{125} In the late 1990s, a Federal Judicial Center (FJC) report revealed the widespread acceptance of mediation.\textsuperscript{126} The report focused on the development of various programs instituted to promote ADR.\textsuperscript{127} Specifically, the FJC’s findings regarding the Multi-Option Pilot Program instituted in the Northern District of California revealed that “most judges involved . . . believed it was achieving its intended goals.”\textsuperscript{128}

Today less than five per cent of civil cases filed in District Court result in a verdict.\textsuperscript{129} Rather, the majority will be negotiated by attorneys in some manner.\textsuperscript{130} By 2004, sixty-three

\textsuperscript{121} AAA, supra note 107 (revealing that civil cases handled by the U.S. Department of Justice from 1995-1998 utilizing ADR had a 65 percent settlement rate compared to a 29 percent settlement rate for cases not using ADR).
\textsuperscript{122} Hoffer, supra note 71, at 114.
\textsuperscript{123} AAA, supra note 107.
\textsuperscript{124} Thomas J. Stipanowich , ADR and the “The Vanishing Trial”: The Growth and Impact of “Alternative Dispute Resolution”, 1 J. EMPIRICAL LEGAL STUD. 843, 849 (2004).
\textsuperscript{125} Id.
\textsuperscript{126} Id. at 853.
\textsuperscript{127} Id.
\textsuperscript{128} Id. at 854.
\textsuperscript{129} Birke & Fox, supra note 29, at 1.
federal court districts had authorized the use of mediation. State court ADR programs have also developed. In 1990, over 1,200 ADR programs were managed in conjunction with state courts. In Florida, there are 11 citizen dispute settlement centers (CDS), 41 country mediation programs, 23 family mediation programs, and 11 civil circuit programs. The success in using a third party neutral is unquestionable in various areas of litigation. The courts and various regulatory agencies have embraced these programs. Transaction lawyers would also see the benefits of the use of a Third Party Neutral to assist them in facilitating their negotiations.

Conclusion

As is demonstrated above, there are numerous advantages to parties in using a Deal Mediator. When deals are negotiated with the assistance of a Neutral who utilizes the principled manner described above, negotiations are more likely to succeed, and stronger relationships likely will result. As with a lawsuit, the presence of a Neutral to keep the parties focused on the objective and avoid personal and irrelevant distractions increases the likelihood that the deal will be consummated. The ability to identify interests and separate them from positions will result in more possibilities to engage in creative option generating and ways to satisfy the interests of both sides at minimal cost to both. The use of objective criteria is a principled way to negotiate that should be rational to both sides. This is an excellent style of negotiation especially in situations where a relationship is just beginning. The Third Party Neutral is in the best position to manage these aspects of the deal to keep things moving forward.

130 Id.
131 Stipanowich, supra note 123, at 849.
132 Id.
133 Id. at 849-50.
134 See id. at 843 (discussing the exploration of ADR in federal and state courts in the business sector and employment and consumer settings).
135 See id. at 849 (discussing how in 2001 approximately 24,000 cases in district courts were referred to a method of ADR).
It is always in the interest of counsel to provide clients with the desired results as efficiently and economically as possible. As with litigation, third party neutrals can be extremely effective in accomplishing this.\textsuperscript{136} Deal Mediation allows transactional attorneys to provide their clients with the advantages alternative dispute resolution has afforded litigators. The result is in the popular negotiation terminology a “win/win.” Third party neutrals can increase client satisfaction by improving the results of their negotiations. Happier clients mean happier transaction lawyers.

For those already engaged in the ADR field, expanding to deal mediation is a “no-brainer.”\textsuperscript{137} Understandably change is never easy, even when that change is for the better. With any new concept “first it is rejected, next it is ridiculed, and finally it is accepted as being self evident.”\textsuperscript{138} Deal Mediation is a concept that may take time, but should eventually follow the path successfully forged by ADR.

\textsuperscript{136} See The Future of ADR, supra note 9, at 6 (“the most experienced lawyers say, ‘[b]eing able to settle client problems effectively is really a boon to business.’”).
\textsuperscript{137} See Hager, supra note 10.