

**Calling All Deal Lawyers —
Try Your Hand at Resolving Disputes**

by James C. Freund

Here's something I don't understand.

At the risk of oversimplification, the world of business lawyers is divided up between those who negotiate deals¹ and those who litigate disputes. But there's a third category of lawyering that falls in between these two areas – resolving commercial disputes through negotiation.

It's a vital category, and what I don't understand is why the lawyers who do the deals have in large part ceded this territory to the litigators who handle the lawsuits. This needn't be the case, and the point of this article is that it shouldn't be.

To me, as an ex-deal lawyer who has lately seen the light, it makes no sense. We deal lawyers share certain professional traits: we relish our client relationships, we thrive on the role of white knight riding to the client's rescue, we pride ourselves on our negotiating prowess and ability to strike advantageous compromises of tough transactional issues. We're self-styled problem-solvers – and Lord knows, these disputes are big problems! So why have we largely abandoned the field of negotiated dispute resolution to the litigators – who often don't have a pre-existing client relationship, whose bargaining skills aren't honed on a daily basis, and who spend the bulk of their time in a win-lose universe that isn't conducive to generating compromise outcomes?

As Oscar Hammerstein's King of Siam was wont to say, "It's a puzzlement."

This is not intended as an anti-litigator article. I worked with a number of fine trial lawyers during my professional life and have great respect for them, individually and as a vital breed of attorneys. Their special skill lies in trying cases and handling all the steps leading up to their day in court. Moreover, a well-rounded litigator also knows how to go about settling a case. I've been told that over 90% of commercial cases get settled before trial. As a colleague of mine put it, "A good litigator's skill set includes the ability to be both aggressive and conciliatory. These are traits that coexist in any litigator worth his salt."

¹ My background is in M&A, and most of the disputes I mediate stem from acquisition transactions. But in using the term "deal lawyer" in this article, or posing examples taken from the M&A field, I don't intend to unduly narrow the focus of my message. I mean "deal lawyer" in a broad sense to refer to someone whose daily fare is negotiating consensual agreements of one kind or another for clients in the commercial/business/financial world, including inside corporate counsel and regulatory lawyers who sit across the table from government officials.

In my view, however, it's more of a mixed bag. I've observed a number of litigators over the years whose disposition towards the settlement of disputes and proficiency at negotiating their resolution has been only so-so. Many cases, which might have been resolved a lot earlier and with better results, get settled on barely satisfactory terms on the eve of trial. Since many of these litigators are skilled professionals, I attribute shortcomings in this regard to two underlying problems most litigators share in the typical contested situation.

First, my sense is (although litigators wouldn't necessarily agree) that it's tough for a litigator to switch from the bristling contacts with the other side in the courtroom or at depositions to rationally discussing the concept of a settlement that satisfies both sides. It calls for a moderation of those extreme demands and utter denials – for the making of conciliatory gestures – that are difficult for some trial lawyers to handle. And each settlement foray is made more difficult by their knowledge that they may have to go back to war, which can lead to a rigidity that's anathema to effective compromise.

Secondly, I believe (although some litigators don't) that it's difficult for a trial lawyer – who's been hired as a gladiator to go to battle for the client's interests – to sheathe his or her sword and prod the client in what is so often the wise direction of settlement. This is especially true with a client who, like so many of them, takes the lawsuit personally. The litigator can almost hear the client saying, *sotto voce*, "What's the matter, tiger – are you scared to try our case?" Yet this lawyerly prodding is often just what's needed to tame the client's machismo and encourage a constructive resolution.

When a controversy arises and isn't quickly resolved, the litigator takes charge of the potential or actual lawsuit. And even if settlement talks get underway, it's the litigator whose presence supplies the necessary threat of going back to the fray should the negotiations prove unavailing. But in terms of those settlement negotiations, I believe the deal lawyer ought to play a very active role alongside his or her litigator colleague. The optimal line-up I envision consists of the litigator and the deal lawyer, working side-by-side as a team.²

² I should note two qualifications to the views expressed in the text. First, deal lawyers may well be involved in trying to resolve the dispute when it first arises, before the litigators are brought in. My point of reference, however, is the period after such initial efforts have proven unsuccessful and the matter has been turned over to the trial lawyer. Second, deal lawyers are sometimes involved in the subsequent settlement negotiations, but operating behind the scenes – in caucus with the client and the litigator – rather than sitting at the bargaining table. This is *not* what I have in mind for the team approach advocated. The key to any negotiator's performance – the ability to size up the situation, offer constructive advice to the client, attempt to persuade the adversary, move the bargaining along, and know how and when to stop – is to be in the room where the action is taking place.

Why, you may ask, should we bother? We should because, in many cases, it's *our* client who's involved in the altercation. The client came to us with his problem. We brought in the litigator to handle the lawsuit.³ But then, too often we excuse ourselves and move on to the next deal. We're busy – too busy to stay involved in the messy aftermath of the last one.

Big mistake! You should never be too busy to help a good client achieve the best practical result in a troublesome situation. You know your client – you know how he or she thinks, you can sense what's important to him, you speak his language. And for reasons I'll go into later, that decent result is often best realized through settlement, as to which your input may prove quite constructive.

By the way, it almost goes without saying that inside corporate counsel should stay actively involved in monitoring significant company disputes, regardless of whether or not an outside law firm is handling the potential litigation. There are so many corporate considerations to take into account in approaching any brouhaha that it's evident the company's lawyers – and not just those with a litigation background – ought to play a crucial role in the handling. In addition, their knowledge of the individuals involved and the corporate imperatives make them ideal intermediaries between the litigators and management.

Until my retirement, I was a deal lawyer who spent most of my time on M&A transactions. In my later working years, I crossed over into dispute resolution, and since then I've been acting as a mediator to help parties achieve negotiated settlements to their disputes. I think my background as a transactional lawyer has given me some useful insights into what's needed to resolve a dispute.

In the balance of this article, I'll discuss:

- Why I believe most commercial disputes involving sizeable companies should be resolved through negotiation rather than litigation.
- The main reasons that it's so difficult to resolve disputes.
- Why many deal lawyers don't become involved in dispute resolution.
- Why deal lawyers should get involved.
- Some preliminary steps deal lawyers can take to head off disputes from arising and keep the parties from ending up in litigation.
- A few tips to deal lawyers for resolving disputes on a two-party unassisted basis.

³ This is the basic situation I had in mind for this article. Obviously, there are other possible circumstances – as where it's the litigator's own client or a shared client of the firm. A deal lawyer's input can still be helpful in those cases, but I can envision some litigators as less welcoming when they consider the client to be theirs.

- How mediation can prove effective in resolving disputes that the parties aren't able to settle on their own, and why deal lawyers are well-suited to playing key roles in the mediation process.

The Case For Settlement

There are any number of reasons why, in the great bulk of commercial cases – particularly those involving dollar disputes – it makes sense to settle rather than go to trial. Litigation is expensive; it takes forever to get a final judgment; lawsuits are a great source of aggravation and negative energy; they can disrupt business operations; there's a potential for negative publicity; an unsettled publicized case can arouse the regulators interest – to name just a few factors. But to my mind, one reason stands out from the others, especially (but not exclusively) in terms of defendants.

Assuming there's a substantial sum of money or other significant consideration at stake in the dispute, it's just too big a risk for a company to entrust its fate to the inscrutability of a judge or the vagaries of a jury or the uncertainty of an arbitrator. For business people, litigation is not a logical way to resolve a dispute. That isn't the way good executives run their companies in other respects. They try to make rational risk-reward decisions, basing their business judgments on an assessment of the probabilities. By contrast, a judge or jury usually has to go all the way for one side or the other, even when the probabilities are more nearly balanced.

When I was representing clients in these matters, my usual advice to defendants was to calculate what they could rationally afford to pay to eliminate the problem, and to plaintiffs, to assess what they would consider reasonable balm to their wounds. Then I'd try to devise a negotiating strategy to make that deal. I would freely concede that this didn't represent a perfect solution – but then I'd remind them that messy situations don't lend themselves to ideal outcomes. With a client who relished his adversary's unconditional surrender – unattainable through negotiations but possible in court – I would empathize with the passion but then refocus him on settlement as a way of controlling his own fate, rather than rolling the dice and facing the possibility of a devastating judicial decision. Operating in today's world, I might borrow the apt phrase of a younger colleague and tell the client, "The outcome of this dispute is just too important to your company to *outsource*."

I realize that other bolder advisors – particularly those representing plaintiffs – may commonly counsel the client to go for broke, and some less risk-averse executives would be amenable to such advice. But the great bulk of the business people I encountered in my years of practice impressed me as more concerned over the possible serious adverse result than enthralled with the prospects of bringing home the entire slab of bacon.

Why Resolving Disputes Is Such Tough Work

There are many reasons why resolving dollar disputes is so difficult.⁴ In part, it's emotional. Each side is enraged at the other, which doesn't create a good atmosphere for compromise. Distrust is rampant. In contrast to a deal where everyone is working hard to make it happen, there's a noticeable ambivalence of attitude in many disputes – one day, it's "let's settle;" the next, it's "let's go back to the mattresses."

In the typical one shot dollar dispute that sprouts in the aftermath of a sale or other completed deal, the parties generally have little or no post-closing relationship and thus lack shared interests that might facilitate resolution of the conflict – in short, there's no incentive to give one's adversary the time of day. And when the dispute arises after one party has paid the other in full (as in a sale), the seller's possession of the money provides powerful leverage that tempts him to adopt a hardball posture.⁵

In a deal, there are dozens of issues to resolve, and no single issue other than price takes on disproportionate importance. You can make progress on them as you go – resolving A, swapping B for C, etc. But in a dispute, where everything often depends on agreeing upon a single number, it's tough to make progress. Much more pressure is placed on the final breakthrough.

But the biggest difficulty in dispute resolution is assessing the litigation alternative that any proposed settlement has to be measured against. What's the likeliest outcome in court, and how likely is it to occur? Unfortunately, you can never know for sure how the trier of fact will come out. And because the judge can't whack up the dollars at issue somewhere in the broad middle where a settlement has a chance of taking place, the negotiated resolution is bound to be at odds with the all-or-none litigation result. Moreover, unlike most deals, in business disputes there's usually a scarcity of models or benchmarks to rely on, since most commercial lawsuits have their own unique facts and dynamics.⁶

In a deal, we're used to having investment bankers and such provide expert opinions on key elements like price, valuations and fairness. In a dispute, the expert advice on the outcome of the lawsuit usually comes from the litigator who is handling it.

⁴ For a fuller discussion of these problems, see James C. Freund, "Bridging Troubled Waters," *Litigation* No. 12, No. 2, Winter 1986, later adapted in James C. Freund, *The Acquisition Mating Dance and Other Essays on Negotiating* (Prentice Hall Law & Business, 1987).

⁵ The opposite may be true if the original deal called for the buyer to hold back some of the funds payable, thus providing incentive for a set-off when a dispute arises.

⁶ Litigators do get some assistance in this regard from damage experts and mock juries.

In dealings with the other side, we expect our litigators to exaggerate their favorable chances in court. How about in caucus? In conversations I've had with seasoned litigators, they've rejected my hypothesis that some trial counsel also pad the anticipated results in advising their own clients. My reasoning was that with a client who's convinced of his company's rectitude and anxious for his gladiator to share his sense of outrage, it's hard for the litigators not to go with the flow. Their rejoinder was that, if anything, good litigators tend to undervalue their positions, consciously or unconsciously, which permits them to be heroes if they win or to be able to say "I told you so" if they lose.

Whatever the merits of that disagreement – and I suspect it varies from litigator-to-litigator, client-to-client and case-to-case – this much I do know. Even when the litigators provide a balanced account – "There's good news and there's bad news" – the clients hear what they want to hear, which is the good news. This is especially true when the executive in charge of the case is the same individual whose conduct has been called into question in the dispute.

As a result of all this, and except in those cases where a savvy litigator has managed client expectations so as to avoid disappointment, each side ends up with exalted aspirations that run in diametrically opposed directions. To make things worse, when settlement talks finally begin, the parties and their litigators pick starting points that are generally much further removed from their expectations than in the situation where two contracting parties, trying to reach a deal, give themselves a little negotiating room. So the gaps going in can be enormous, which tends to discourage each side from making the effort to bridge them.

But here's the most daunting part. Even if, by some miracle, both sides (in the privacy of their own caucus) were in basic agreement as to the vicinity where the settlement could take place, the journey to get to that number from those overheated starting points dwarfs everything else in difficulty. And that's precisely why, in my view (although litigators may well disagree), a deal lawyer – who approaches this kind of negotiating challenge with a sense of solvability that's conspicuously absent in the usual litigation context – can play a useful role in seeking an out-of-court resolution.

Why Deal Lawyers Don't Often Get Involved in Dispute Resolution

Let me begin this section with a confession. The view I'm expressing here – urging deal lawyers to become involved in dispute resolution – is *not* the way I (and most other deal lawyers encountered across the table) felt back in the days when I was doing M&A transactions.⁷

⁷ See James C. Freund, "Confronting the Big L," *The M&A Lawyer*, Vol. 4, No. 9, February 2001.

We spent lots of time negotiating agreements that generated rights and liabilities, creating the potential for indemnification claims if the company being acquired was privately owned or the subsidiary/division of a public company. But even though we knew these provisions could lead to post-closing disputes, there was little discussion of what would happen if a squabble actually arose. To be sure, the boilerplate contained a choice of law provision and perhaps a choice of court for possible litigation, and arbitration was sometimes substituted for court decision. But there was rarely anything about what could be done to head off litigation or arbitration in the event a dispute arose. With all the effort given to defining rights and responsibilities – eliminating uncertainty and ambiguity – you’d think we would have paid more heed to resolving any altercation that managed to slip through the net.

Was it because back then we were living in a less litigious world than today? I don’t think so, and the prevalent takeover wars of the day certainly spawned all kinds of litigation. Was it because we were more concerned with the conditions to closing – and in the old days, spent a lot of time on such arcane subjects as registration rights and legal opinions? Maybe it was because, deep down, we knew how difficult it could be to resolve a real fracas, and we didn’t want to contemplate the fall from grace of being saddled with a messy lawsuit.

Actually, I think there were two main reasons, which I have to assume still play a role today. First of all, when you’re under pressure to get a deal done, no one is anxious to raise the additional issue of how to resolve a potential lawsuit – especially when it relates to something that hasn’t yet occurred and that everyone is hard at work to prevent from happening. Second, there’s a dose of the timeworn “it’s not my problem” syndrome at work here – the deal lawyer figuring that any dispute cropping up later on will be turned over to the litigator, so it’s the other guy’s worry.

But that’s just where deal lawyers go wrong – it *is* their problem, and they shouldn’t duck it.

Why Deal Lawyers Should Get Involved in Dispute Resolution

As I said before, to my mind the best line-up to handle any dispute that arises is a litigator and a deal lawyer, operating as a team. The lawsuit is clearly the litigator’s turf. But settling the lawsuit – resolving the commercial dispute – is a chore on which we deal lawyers, paired with the litigators, can be very helpful.

One real plus the deal lawyer brings to the table is familiarity with the territory. The deal lawyer knows what such clauses in the disputed agreement are supposed to mean, how such language was meant to be interpreted, the way the original negotiations can come into play, and so on.

I ought to insert a caveat here, though. It’s something of a two-edged sword when the deal lawyer who is engaged in trying to resolve the dispute is the same lawyer who handled the original transaction that’s the subject of the controversy. On

the plus side, there's a familiarity with the details of the agreement and the course of the negotiations. The minus is whether his advice can be totally disinterested if there's some question about his conduct in the original deal – for example, if he drafted or approved an ambiguous provision whose meaning is now in dispute, or he omitted to include some disclosure that's now under attack in a shareholder suit. In such a case, it may be preferable to bring a different transactional lawyer onto the settlement team.

In addition to the deal lawyer's presumed negotiating skill, there are frequently tax, accounting or valuation aspects to the dispute that he or she may have a better handle on than the litigator, who is less likely to come in contact with these disciplines on a regular basis. Also, in those situations where the parties to the dispute have a continuing relationship and the best means of resolving the problem is to strike a new deal, the transactional lawyer is the person to handle it.

Having the deal lawyer in the picture may also be in the litigator's best interests. It frees the litigator to play his or her aggressive role with the other side to the hilt.⁸ Conversely, the litigator's looming presence allows the deal lawyer to be constructive in trying to negotiate a settlement without conveying weakness, since the other side realizes the litigator is waiting impatiently for the negotiations to break down so he can get back to the job of stomping on the adversary in court. The dynamic duo keeps the other side off balance, since it can't tell who will prevail in the councils of the duo's client.

If, in private caucus, an actual difference in viewpoint exists between the litigator and deal lawyer, this can actually be helpful to your client in his decision whether to fight or settle. Neither the litigator nor the deal lawyer should be committed to litigating or settling at any cost. Rather, they should each realize that the scales can tilt either way as the bargaining proceeds. When the negotiations stall, after getting advised by both lawyers, it's the client's call on which course to take.

Early Steps to Prevent a Dispute From Ending Up in Litigation

I don't intend to discuss this in detail, but here are a few thoughts on what deal lawyers can do at the time the transaction is originally negotiated to prevent a dispute from ever arising, or at least to put the client in the best possible position to prevail in court or at the bargaining table if it does.⁹ I'll use as my model a typical private corporate acquisition containing indemnification provisions.

⁸ Who plays what role in the negotiations may well depend on the circumstances of the case. For instance, in the situation where it's the deal lawyer's professional performance that is under scrutiny, he may well be taking a tough line, and the litigator might have to play the role of compromiser.

⁹ See the discussion in James C. Freund, "A Dozen Tips on How to Resolve Post-Closing M&A Disputes Outside the Courthouse," *The M&A Lawyer*, Vol. 7, No. 6, Nov.-Dec. 2003.

It goes without saying that you need to be especially careful in drafting the acquisition agreement, because when the fur starts to fly after the closing, each word and phrase is perused to a faretheewell. Sentences are ascribed unintended meanings, especially when they're not drafted narrowly enough. Innocent omissions can become major obstacles to trying to achieve a rational result.

For instance, as a mediator I've been presented with an argument that if in one place the agreement says "representations and warranties" while in another the reference is just to "representations," the parties meant to create some sinister distinction. I've heard a serious contention that where the phrase "consistent with GAAP" is used instead of the more typical "in accordance with GAAP," it was intended to set up wholly different standards.

For the plaintiff-buyer, in order to prove misrepresentations causing damage, you need to show you were reasonable in relying on what you were told during due diligence – the issue of justifiable reliance. For the defendant-seller, you want to be able to prove that what the buyer learned during due diligence alerted (or should have alerted) him to the risks ahead. Both sides need to keep these goals in mind as they proceed through due diligence. My observation is that this doesn't always happen.

So, for instance, if the seller doesn't allow the buyer to investigate some particular area, the buyer ought to scream bloody murder right then and there, and document the restricted access. That way, even if you don't get inside a particular door, you're preserving your right to claim deliberate concealment down the road should that forbidden area turn sour. Conversely, where the seller has made available information that bears on a certain key aspect of the company, and the buyer chooses not to avail himself of the invitation, the seller ought to make a contemporaneous record of what happened – to obviate the buyer's claim down the road that important information was withheld from him.

When an indemnifiable breach is alleged that affects the reported earnings or projections of the seller, one of the biggest obstacles to settlement – which exists even if the parties are able to agree as to fault – is valuing the breach. I was a mediator in a case several years ago where the going-in damage numbers of the two sides, assuming the breach, differed by about seven to one – in other words, if the plaintiff valued the breach at \$70 million, the defendant valued it at \$10 million. And each side had a respectable financial expert pointing to allegedly applicable damage principles to back up its valuation. It's worth thinking about whether there might be something you can do in advance to forestall this result — to get both sides on the same damage wavelength and then incorporate the results into the agreement, or at least into some contemporaneous memorandum.

I recommend to both sides that each hold a caucus well before signing the agreement – don't wait until the last moment – at which the deal executives, together with their legal, accounting, financial, operational and tax advisors, get together and brainstorm the subject of what can go wrong here.

- For the seller – what business, financial, legal or tax issues might arise down the road, based on what we know about our company, that may cause the buyer to feel he was snookered and seek recompense?
- For the buyer – what potential soft spots have we ascertained during due diligence on which we want to provide ourselves contractual protection, should these develop into something negative?

I guarantee some ideas will come to the surface as a result of this caucus that can form the basis for negotiating additional rights, remedies or protections in the agreement.

When I was doing deals, I'd always bring in specialists from different practice groups of the firm to help me think through and negotiate areas of the agreement that called for specialized knowledge — tax, ERISA, environmental, and so on. But except in the takeover context or in a “going private” transaction or some other deal where a lawsuit could be anticipated, I don't recall inviting a litigator to help us plan our potential post-acquisition breakdown strategy.

Now, however, having been exposed as a mediator to the bloody aftermath of a number of deals, if I were still doing M&A, I'd include a litigator on the team up front — not only for the “what can go wrong” caucus, but more generally to help plot strategy to ensure that our side is in a strong position should things turn south. Let's face it, we deal lawyers don't think like litigators — but the post-acquisition flap is going to be delivered into their hands. We can learn a lot from them, and we should take advantage of it. (In fact, now that I think of it, this might be the subject of my next article – urging litigators to try their hand at doing deals!)

If, notwithstanding all the care you take, an altercation does arise down the road, it's often difficult to resolve through two-party bargaining for the reasons referred to earlier. Over the past decade I've become a real convert to the efficacy of a well-handled mediation in resolving disputes – especially those that arise in the aftermath of an M&A transaction. (I'll be discussing mediation below.) If the parties wait until the dispute arises, however, they may never get to mediation – one or both of them being too irate to agree on a consensual procedure, or worried (erroneously, to my mind) that to propose mediation constitutes a sign of weakness, or unrealistically optimistic about what will happen once the contretemps gets to court.

So, my advice is to build a compulsory mediation provision into the agreement. The parties will have to give mediation a shot – albeit they're not bound to settle the case – before heading off to the judge. Deal lawyers are well-advised to seek

drafting help on what's to be included in this provision from someone at the firm who's knowledgeable about mediation.¹⁰

Some Tips on Resolving Disputes

It's not the purpose of this article to discuss the finer points of negotiating.¹¹ Rather, I'm assuming that you deal lawyers know how to bargain effectively, and I'm suggesting that those skills can be put to good use in resolving disputes. But I can't resist offering you a brief quartet of negotiating suggestions geared to two-party unassisted dispute resolution.

Be persistent. Unlike the pressing deadlines in a deal, there's no quick fix in settlement discussions. One case I handled involved settlement talks, interspersed by litigation maneuvers, that went on for a number of years. You simply have to stick with it, no matter what the frustrations. Instant gratification is for bowlers.

Be creative. There may be things other than whacking up a pot of cash that can bring the parties together. Say, for example, there's a question about the value of a disputed property. The property happens to be a natural resource that's divisible. It may be possible to transfer some of the property itself in the settlement, instead of reaching an impasse trying to agree on the dollar value.

Appreciate the significance of time. For instance, payments spread out over a number of years contain both a financial and psychological dimension. The recipient can say, "I settled for \$1 million," which is the face amount of the payments. The payor can say, "I got rid of the case for \$700 thousand" – the net present value of the future installments.

Try a piecemeal approach. If your initial discussions have isolated several difficult issues, attack them separately. By chopping the overall settlement into parts, you may achieve a series of small accords that, taken together, pave the way for the ultimate resolution.

How Mediation Can Be Helpful To Resolve Disputes

Sometimes it's impossible to settle a case through two-party bargaining. This is where mediation comes into play— when you're stuck between the rock of litigation and the hard place of unavailing negotiations.

¹⁰ Make sure, however, that the mediation provision doesn't interfere with your clients' ability to seek emergency relief while the mediation takes place.

¹¹ For my thoughts on the subject, see James C. Freund, *Smart Negotiating: How to Make Good Deals in the Real World* (Simon & Schuster, 1992). See also, James C. Freund, "Remembrances of Things Past: Plus, My Ten Commandments for Negotiating Deals," *The M&A Lawyer*, Vol. 9, No. 5, October 2005.

I've acted as a mediator a number of times, lectured and written articles on mediation, and become a true believer in its worth. A well-handled mediation can cope with many of the problems encountered in settling disputes – overcoming the parties' resistance to talk, surmounting their ambivalence, mitigating distrust, introducing a sense of solvability, maintaining momentum, and reducing the litigator's gladiatorial burden. In addition, an effective mediator can uncover shared interests suitable for reconciliation, advise the parties how the issues are likely to play out in litigation, add the mediator's credibility and imprimatur to proposed solutions, and help the parties find a mutually satisfactory resolution.¹²

For the reasons given below, I think a party's mediation team should include a deal lawyer, along with the decision-making executive, a financial person and the litigator. My hunch is that a lot of deal lawyers are turned off by the concept of participating in a mediation – especially when it goes under the uninviting rubrics of “alternative dispute resolution” or ADR. But they shouldn't let themselves be deterred. Mediation provides a real opportunity for a deal lawyer to perform a crucial role for his or her client.

To explain this, I need to summarize my view of how mediation works. The key to the process is the mediator – not just the quality of the individual but the approach he or she takes toward the mediator's role. And on this subject, there is some difference of opinion.

Let me illustrate this with a simple but pretty typical example. Imagine a situation where the plaintiff is seeking \$1 million in damages. His lawyer advises that they have a strong case. So the client is looking for a settlement in the \$750,000-plus area. To give himself some bargaining room, he starts out settlement discussions asking for \$900,000.

The defendant's lawyer, however, believes the case could go either way. So the defendant is aiming at a settlement in the neighborhood of \$500,000. She begins by offering \$300,000.

As a result, there's a \$600,000 spread in their positions (between \$900,000 and \$300,000), which both sides realize will be hard to bridge. So they decide to try mediation.

Now, some mediators restrict their role to acting primarily as a facilitator. They see themselves as providing important services, including:

- Fostering a constructive environment for the parties.

¹² For an extended discussion of the mediation process, see James C. Freund, “The Neutral Negotiator – Why and How Mediation Can Work to Resolve Dollar Disputes,” Prentice Hall Law & Business, 1994 (1996 photo reprint on file with *The Business Lawyer*, University of Maryland School of Law).

- Helping them understand their legal positions.
- Assisting them in their evaluations of what the other side proposes.
- Trying to find out their underlying interests with a view to reconciliation.
- Possibly helping them to create additional values, perhaps by “enlarging the pie.”

Let’s say the parties use such a mediator, and he or she is successful in getting behind those opening positions and gaining access to the actual expectations of the parties – perhaps even getting them to communicate these to each other.

Does that mean there’s a deal? Not by a long shot – because once the plaintiff comes down from \$900,000 to \$750,000, and the defendant comes up from \$300,000 to \$500,000, there’s still a big gap of \$250,000.

As for reconciling interests, the typical one-shot dollar dispute offers fewer opportunities for this than situations involving continuing relationships. And my experience is that creating value and enlarging the pie works best when the parties are close to a deal and just need something to get them over the hump – not, as here, when they have very different ideas as to the value of a case.

What I see in the complex commercial disputes I mediate is that when you get underneath the posturing to what is hopefully fertile ground for agreement, you discover that one (or often both) of the parties is unrealistic in terms of overestimating the strength of his case or anticipating the other side’s unconditional surrender, or is misreading the situation in some other respect.

In my view, these parties need a different kind of mediator – not just a facilitator, but one who is activist and judgmental. To undermine those exaggerated aspirations, they need a splash of reality in the face – and the mediator has to function as the agent of that reality. They have to undergo the ordeal of seeing the dispute and their “winning” positions through a pair of impartial eyes, in order to justify the sizeable movement needed to bridge a big gap.

And so, when I’m the mediator – and assuming the parties have indicated they’re receptive to my playing this kind of role – I give my views on the merits of the issues involved, help the parties arrive at a substantive basis for settlement,

and try to play an instrumental part in actually negotiating it.¹³ Nothing short of this, in my view, has a decent chance of success.

It also points up one practical reason why mediation works in a corporate setting. In two-party dispute resolution without a mediator, it's difficult for the responsible executive of the client to agree to a settlement figure that seems so much worse than what he's been advising his superior or the board to expect. But the mediator's judgment on the merits provides neutral cover for the executive, making it less likely for him to be second-guessed by higher-ups. You could almost call it a "negotiated settlement insurance policy."¹⁴

I won't go into detail here,¹⁵ but my own favored technique is to get away from traditional bargaining – carrying offers and counters back and forth – and engage in simultaneous private negotiations between myself and each of the parties in separate caucus. I try with each side to find a common resolution level at which they'll be comfortable settling the dispute, but without either side knowing, until the end, just where its adversary stands.

I'm aware that some mediators like to bring the parties together for substantive discussions, but I'm a strong advocate of the private caucus for a number of reasons. The most crucial of these is that the mediator has to be able to tell a party which of his side's arguments are strong and which aren't – going right to the merits. The party won't like the mediator's negative judgments, but it would be infinitely more painful (and make the dispute harder to settle) if this were done with the other side present. In addition, the mediator needs to balance the negative views she expresses on a party's weaker issues by seeking that party's help in private on how best to communicate its strong issues to the other side (in effect, the mediator becoming the party's agent to do a little "selling"). And finally, at a later point in the proceedings, the mediator has to be able to suggest outcomes and dollar levels and such – places where a rational deal might be made – and this can only be handled in private.

As a mediator, I sometimes get the feeling that the skilled lawyers representing the parties are a little uncomfortable operating in a mediation format, and for that reason, may not be as effective as they are in other milieus. If I'm right, it's probably because the process differs from what they're accustomed to engage in. Most of them are litigators, whose daily fare consists of direct face-to-face verbal combat with their adversaries, whether before a judge or locked in a conference room. They're

¹³ See James C. Freund, "The Business Lawyer as Mediator," *Alternatives to the High Cost of Litigation*, Vol. 16, No. 2, February 1998.

¹⁴ On the flip side, the mediator's recommended dollar amount provides a pesky benchmark for second-guessing – something that has to make any executive think twice about forging ahead without settling and then ending up worse off at trial.

¹⁵ For more detail, see "The Neutral Negotiator" article cited in footnote 12.

not used to having to deal through an intermediary in a setting where what's called for is some constructive discussion (as contrasted with merely stating positions or making arguments).

The most salient fact for a lawyer participating in a mediation to remember is that he or she is still very much in a negotiation. But it's not garden variety, because it's with two different folk – the party (and his counsel) on the other side and the mediator herself.¹⁶

Unless the mediator takes a very narrow view of her role as purely facilitative, she's definitely bargaining with the lawyers and their clients. It isn't an adversarial negotiation (the way it would be if both sides' lawyers were speaking directly to each other), but more in the nature of the bargaining that goes on between two business lawyers charged by their clients with crafting an amicable arm's-length deal that resolves the various points still in conflict.

This is one key reason that I think an astute deal lawyer who negotiates for a living may have a lot to offer in a mediated dispute arising out of, say, a corporate acquisition. The deal lawyer has a real grasp of how an acquisition agreement is supposed to work, an understanding of complex business-type issues as well as tax and accounting considerations, a positive problem-solving mentality and a feel for developing a mutually acceptable compromise.

As a lawyer for a party dealing with a mediator, you have two key objectives: getting the mediator disposed toward your view of dispute, and persuading her to communicate that opinion to the other side under the mediator's imprimatur – which is what it takes in order for this to have real impact. It's analogous in a deal to convincing the other side's lawyer as to the merits of the approach you're taking, so he can tell his client it's acceptable. The other side won't move a lot unless the mediator leans heavily on them – serving as an agent of reality, acquainting them with the perils of their case.¹⁷

When I'm the mediator, and the parties are each trying to persuade me in private caucus of the merits of their positions, the biggest mistake they make is to take unreasonable far-out litigation positions that aren't really defensible. These positions

¹⁶ See James C. Freund, "Representing Clients in a Mediation," *ADR Report*, Vol. 2, No. 9, April 29, 1998.

¹⁷ This reality function is the reason I'm puzzled to hear some people interpret a party's willingness to mediate as a sign of weakness. When I represent a party, I prefer to think of voluntary participation in mediation as a validation of our strength. In effect, we're so convinced our case is good that we want the opportunity to persuade a mediator of this; and once the mediator agrees with our conclusion, he or she will then be able to demonstrate to the other side how futile it would be for them to pursue litigation. Conversely, if you have a weak overall case, you better think twice about whether to go to mediation – because once the mediator realizes it, you may find yourself in a very tough position.

might be legitimate for litigation or arbitration – and I’ll excuse them during the time that both sides come together at the outset of the mediation to put their respective best feet forward, and even when each is making its initial private case to the mediator. But when the discussion in the private session has progressed from information-gathering to the mediator’s attempt to find some basis for reconciling these widely disparate views, and a party or its counsel still reiterates the same overblown theories with the same degree of certitude – seemingly carried away with their own rhetoric – that’s what really turns off a mediator like myself.

A good deal lawyer should know that, once his side gets down to business with the mediator in private caucus, he has to start differentiating between issues – preserving his firepower to take strong but reasonable positions on those issues where he thinks he can persuade the mediator to come along. The mediator will appreciate this rational approach and respond to it, and the mediator can then work together with that side’s team to sharpen the “reality” message that the mediator will deliver to the other side.¹⁸

Here’s a good example of how a deal lawyer can play a useful role in mediation. When I represented a party in a complex dispute with multiple dollar issues, I would work with my client to develop what might be termed a “compromise matrix.” We’d take each issue individually and assign it two rankings – the first based on the amount of dollars it involves, and the second, the relative strength of our side’s arguments in favor of our position.

We would try to hold pretty firm on the issues with big dollars (for obvious reasons) and strong arguments (as to which there will be less need to compromise, assuming we can persuade the mediator to concur in our assessments). On the other hand, we could be very flexible on the issues with small dollars, especially those where our arguments were second rate. On big dollars but weak arguments, we would work hard for an even split, if possible. On medium dollars and strong arguments, we would aim for, say, 75% of what’s at stake.

So we would be giving the most ground on issues that tend to hurt us less in the pocketbook and where we have less ammunition to support our position. Conversely, we would remain stronger on the issues where more was at stake and we could stand tall. And for each issue we would devise a logical compromise that we’d ultimately be prepared to make – after going through some intermediate intervals and seeing some signs of reciprocation from the other side. It makes a lot of sense to be

¹⁸ There’s an apt deal-making analogy to this point. In negotiating a transaction, a good deal lawyer knows what she has to do to achieve credibility. If she wants the other side to be convinced that the position she’s taking on a certain key issue is rock solid and not a bluff, she has to show how meaningful the point is to her side. She realizes, however, that she will not be able to achieve “sticking” credibility by taking a “this is it” position on multiple issues. Rather, she will gain credence for her inflexibility on the key issue by showing her willingness to give ground on other issues of lesser significance. See *Smart Negotiating* (cited in footnote 11) pp. 69-70.

prepared in advance as to where you want to take a stand and where you're willing to yield; and the mediator will appreciate getting some indication about this from you at a relatively early stage in the proceedings.

You can see, can't you, how this sort of thing is right up a deal lawyer's alley.

You also have to develop special tactics suitable to the indirect bargaining format of a mediation. An example is what I term a "conditional offer" to the mediator.¹⁹ It's a useful tactic when you want to show the mediator that your client is willing to be flexible, but don't want to put a specific number or formulation on the table with the other side. And it's just the kind of thing a deal lawyer is familiar with from transactional work.

Say that the parties' present positions on an issue are far apart – the other side is at A and you're at Z – and you think that if the spread were reduced to B and Y, then some real progress could be made. But you don't want to go to Y first. Rather, you want to encourage the mediator to push the other side into the vicinity of B. So you say to the mediator: "We're willing to move to Y, but only after the other side has come to B – and you're not authorized to mention our willingness to go to Y to the other side." Sometimes, you might go further and indicate to the mediator that she's not even authorized to have the suggestion come from the mediator (as in, "Maybe if you'd move to B, I could get your adversaries to buy into Y . . ."), until they've shown a clear disposition to move to B.

In mediation, it's also necessary to negotiate with your own client, in a manner of speaking – bucking him up when he ought to display some resistance, helping him recognize when the time is ripe to move things along. Even when you have powerful leverage, your client must be willing to compromise. There's no more chance of unconditional surrender in mediation than there is in dispute resolution generally. It's your client's willingness to move a little that allows the mediator to convince the other side to move a lot. This is something deal lawyers can relate to, while (for reasons stated earlier) it can be a difficult role for some litigators to play.

One final thought here. I've been involved as a mediator in certain situations, such as the breakup of a business between partners, which require resolution both of specific disputed issues and of business matters that aren't in dispute but need to be settled for the split-up to take place. I call this "deal-dispute mediating," because the parties have to make a deal which has the effect of resolving their disputes. Other commercial situations of this nature could be a corporate joint venture that has soured, or a financially troubled company with too many mouths to feed that attempts a turnaround to avoid bankruptcy. As you might expect, this constitutes prime territory

¹⁹ See the "Representing Clients in Mediation" article cited in footnote 11.

for a deal lawyer, whose business sense, negotiating skills and pragmatic approach are what's needed to represent a party in one of these tense business situations.²⁰

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At any rate, I hope you'll agree with me that negotiated dispute resolution, and especially the mediation format, is a potentially fertile field for deal lawyers; and the next time I climb into my mediator's chair, I'll look forward to seeing you at the table on behalf of your good client.

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²⁰ For an extended analysis of the usefulness of mediation in such a context, see "Anatomy of a Split-Up – Mediating the Business Divorce," 52 *The Business Lawyer* 479 (Feb. 1997).