

GUIDE TO DEAL MEDIATION



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PART 1: ABOUT DEAL MEDIATION

What is Deal Mediation?

Deal mediation is a facilitated negotiation of a business transaction in which a neutral third-party works with the dealmakers from both sides, helping them to communicate better, identify opportunities for mutual gain, maximize transaction value and conclude the richest possible deal.

What is the Goal of Deal Mediation?

The goal of deal mediation is to consummate the best possible transaction for all parties collectively, in other words, to maximize the value of the deal for everyone involved.

What Types of Transactions Can Deal Mediation Help With?

Deal mediation works extremely well for a broad range of business transactions, including financings, mergers, acquisitions, business sales, asset transfers, corporate alliances, joint venture formation and technology licensing, to name a few. From the most basic contract formation to the most complex M&A deal, the mediator can add tremendous value, help prevent deal failure and guide all parties to their most efficient outcome.

PART 1: ABOUT DEAL MEDIATION

Is There a Downside to Trying Deal Mediation? - Part I

The downside to trying deal mediation is minimal. If the mediation session doesn't produce a deal, the parties will be out the cost of the mediator's fee (which the parties generally split equally), and some of their time, but nothing more.

At a minimum, if everyone is acting in good faith, each side will have had an opportunity to communicate about its needs and interests in a potential transaction. This has the advantage of laying the groundwork for a future deal if the parties so choose.

People considering deal mediation sometimes worry that participating in the session will somehow cause them to tip their hand or disclose more than they want to or will somehow weaken their bargaining position. This is a fallacy. By encouraging negotiators to discuss their needs and interests with one another, mediation actually *increases* the likelihood that everyone will get what's most important to them in the deal.

In traditional negotiations, known as "positional bargaining," each side takes a stand and makes demands, while hiding information about their true interests, and the result is that no one's needs are met. In mediation, each negotiator will have a chance to speak openly about what matters to them and why it matters, giving the other side the opportunity to address the concerns and achieve the best possible agreement.

PART 1: ABOUT DEAL MEDIATION



Is There a Downside to Trying Deal Mediation? - Part II

Of course, any information that a party wishes to protect from disclosure to the other side can be handled in a caucus. The mediator will absolutely not reveal information that was provided to him or her in confidence by either party. See the section in this Guide on caucusing in deal mediation for more information.

Sometimes a concern is raised that one party will act in bad faith and use the mediation session solely as an opportunity to see what the other side has in mind, perhaps about value or about concessions or deal terms. Although this type of behavior has been known to occur in a deal mediation, in my experience it is so rare as to be a non-issue.

Nevertheless, it is worth noting that using deal mediation to obtain “free information” is a misuse of the process; however, it doesn’t violate any law. If someone believes this is occurring, that party should either end the session or bring it to the mediator’s attention. The mediator can then terminate the session or, at a minimum, air the issue and then explain to the abusing party how negotiating in bad faith will impede completing the deal.

PART 1: ABOUT DEAL MEDIATION

How Does Deal Mediation Differ from Dispute Mediation?

Deal mediation is a facilitated negotiation of a business transaction. Dispute mediation is a facilitated negotiation of a conflict. The two are similar in that a trained, skilled neutral helps the parties communicate about their needs and interests and assists them in concluding a deal. In deal mediation, however, the neutral third party is involved pre-conflict, when there is no dispute to resolve.

PART 2: THE DEAL MEDIATOR

What is a Deal Mediator?

A deal mediator is a neutral third-party who helps businesses form better deals. Using a mediator's skills, competencies and tools, the facilitator assists negotiators to clarify their objectives, uncover value, identify gains from trade, find creative solutions, and conclude their optimal transaction. A deal mediator has two overriding objectives: The first is to help the parties make their deal – that is, avoid deal failure - and the second is to help the negotiators on both sides improve their outcome – that is, achieve the most efficient terms for everyone and maximize transaction value. The deal mediator helps the parties form the richest possible deal by focusing on information exchange, encouraging interest-based negotiating, fostering discussion of pie-expanding options and identifying value-creating trades.

PART 2: THE DEAL MEDIATOR

Why Use a Deal Mediator?

A deal facilitator is an invaluable resource for anyone who plays a role in putting together business transactions. Negotiators can benefit immensely from the involvement of a neutral third-party whose mandate is to help both sides discuss their underlying needs and interests, and who is focused on identifying options for mutual gain and maximizing transaction value. When making deals, negotiators typically become focused on dividing what they believe is a fixed pie, the result being a highly competitive and even adversarial discussion that results in missed opportunities for value-creating trades. The job of the deal mediator is to assist the parties in finding and concluding the best possible deal for everyone involved. A deal mediator can help avoid deal failure and can help the negotiators collectively identify and conclude the most efficient transaction for everyone involved. In other words, parties who use a neutral facilitator are more likely to conclude a deal in the first place and are more likely to conclude an optimal deal that serves everyone's interests.

How Does a Deal Mediator Add Value?

A deal mediator can make the difference between the success and failure of a business negotiation. As an impartial manager of the negotiation process, his job is to eliminate barriers to efficient dealmaking and to help all parties negotiate more effectively so they can find and consummate their optimal transaction. A deal mediator is able to accomplish what the two parties alone cannot. Negotiators can generally work out a deal with a mutually acceptable outcome on their own. The deal mediator sets the bar much higher, however, with the goal being to assist the parties in finding the richest-possible outcome. By using a deal mediator, the parties have their best chance at reaching their best deal.

PART 2: THE DEAL MEDIATOR



What Are Some of the Things a Deal Mediator Does? - Part I

The deal mediator's mandate is to ensure that the best possible outcome is achieved for all of the parties *collectively*, in other words, to facilitate the formation of the most efficient deal.

A skilled deal mediator does the following:

- Manages and organizes the negotiation process
- Keeps the parties on track in their discussions
- Identifies each side's objectives
- Encourages each side to discuss their true needs in the deal
- Breaks deadlocks
- Works productively with the parties' advisors
- Proposes creative solutions that the parties had not thought of
- Identifies value-creating trades
- Neutralizes posturing on both sides
- Enables each side to explore options in confidence
- Serves as a sounding board
- Guides and stimulates brainstorming
- Reframes complex issues
- Anticipates and handles deal fatigue
- Intervenes in inefficient conversations

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PART 2: THE DEAL MEDIATOR



What Are Some of the Things a Deal Mediator Does? - Part II

As stated in the previous section, the deal mediator's job is to ensure that the best possible outcome is achieved for all of the parties *collectively*, in other words, to facilitate the formation of the most efficient deal.

A skilled deal mediator helps the dealmakers:

- Set an agenda for the negotiation
- Clarify objectives
- Understand the other side's needs
- Identify differences between the parties
- Focus on the most critical issues
- Collaborate productively
- Find creative solutions
- Avoid bargaining failures
- Take a fresh look at the transaction
- Locate common ground
- Generate new ideas for deal formation
- Discover efficient trades
- Avoid leaving value on the table
- Overcome personality conflicts
- Handle mistrust
- Reach their optimal agreement

PART 2: THE DEAL MEDIATOR



What Skill and Expertise Should the Deal Mediator Have?

A deal mediator must have considerable training and experience in the field of mediation, but conflict resolution skills are not enough. In addition, the deal mediator must have a strong business background, substantial experience in a broad range of transactions, an understanding of deal dynamics and the ability to control a process usually inhabited by business people who feel they know best.



What is a Deal Mediator *Not*?

A deal mediator is not a decisionmaker in the transaction; he is not a negotiator for either side; he is not an evaluator of the deal terms; and he is not the equivalent of a judge or arbitrator.



Does the Deal Mediator Take Sides?

The deal mediator is neutral, meaning he or she has a responsibility to assist all parties in a balanced way. He does not favor one side over another and, in effect, is “on everyone’s side.” The mediator’s promise is to work fairly on behalf of all participants by helping them reach their own best agreement.

PART 2: THE DEAL MEDIATOR

Will the Mediator Pressure the Negotiators to Reach a Deal?

The goal of deal mediation is to consummate the best possible transaction for all parties collectively. However, a deal mediator must never pressure either side (or both sides collectively) to close a deal. As anyone in business knows, not every deal is worth doing, and it's not appropriate for the mediator to make that determination for the parties. The deal mediator facilitates the negotiation, and helps the negotiators formulate their best possible transaction. He then defers to the decisionmakers to determine whether or not to close.

Will the Deal Mediator Offer the Parties His Opinion as to Terms?

Each side in the deal will have its own negotiators and, in most cases, its own advisors (such as lawyers, investment bankers or accountants). The mediator will not provide an opinion as to what deal terms are appropriate or how the transaction should be concluded. The deal mediator is there to facilitate the transaction on behalf of all parties, and he is at all times agnostic about the outcome.

PART 2: THE DEAL MEDIATOR

Is a Deal Mediator the Same Thing as an “Honest Broker”?

The term “honest broker” is often used in the geopolitical arena and is defined as “a person, group, or country that serves as a mediator to help other people reach an agreement”. The first usage of the term can be traced to the late-19th Century when German Chancellor Otto von Bismarck referred to himself as an “ehrlicher Makler” (honest broker) as he brought together the representatives of various countries to settle the Balkan question. A deal mediator is similar to what is historically called an “honest broker,” someone who brings the sides together to hammer out an agreement, the primary difference being that the deal mediator has training and experience in helping parties negotiate more effectively, communicate better and uncover options for mutual gain.

How is a Deal Mediator Compensated?

The only appropriate way for a deal mediator to be compensated is at an hourly rate or, at the parties’ election, based on a flat fee upon an estimate of the number of hours to be devoted to the mediation. A deal mediator must never receive a success-based fee or a commission in which payment is tied to the closing of the deal. The reason is that it’s sometimes best that a deal actually not be consummated, and if paid a success-fee based on a closing, the deal mediator cannot be truly impartial in relation to the transaction. It’s critical that the mediator have absolutely no financial incentive to pressure the parties to close, lest he lose his impartiality and objectivity in the session.

PART 3: BENEFITS OF DEAL MEDIATION



What's Wrong With Direct Negotiations? - Part I

A deal mediator changes the negotiation dynamic in critical ways by helping the parties have a more productive discussion than they could have on their own, keeping the discussion focused on interests, minimizing posturing, finding points of agreement, exploring opportunities for mutual gain, and then moving everyone toward a positive agreement based on how to best meet everyone's concerns and true needs.

Negotiators who bargain with one another directly in contract formation risk losing the deal altogether due to an endless list of factors, any one of which can derail a transaction; they also risk doing a sub-optimal deal in which one or both sides leave value on the table; finally, even if the deal gets done, it may be concluded at huge cost and unnecessary aggravation.

There are a number of reasons why one-on-one negotiations don't lead to optimal deal formation or, worse, result in complete deal failure. Faulty assumptions, misunderstandings, hardball tactics, cultural differences, personality conflicts, information asymmetry, time-pressure and basic distractions are just a few possible reasons.

Businesses that choose deal mediation have an opportunity to form a deal of higher quality than they could achieve on their own through one-on-one negotiations. Mediators are trained to handle the communication process in a way that encourages the parties to negotiate collaboratively and productively rather than to bargain against each other at cross-purposes. This is sometimes described in terms of "positional bargaining" versus "interest-based negotiations."

PART 3: BENEFITS OF DEAL MEDIATION

What's Wrong With Direct Negotiations? - Part II

In positional bargaining, each side approaches the negotiation as akin to a battle about who will get what share of a fixed pie, and the process involves each side starting from an extreme opening point, followed by a series of mutual concessions in which each side moves gradually off the prior demand (by agreeing to accept a little less) or the previous offer (by agreeing to give a little more), ultimately resulting in a compromise somewhere in between each side's starting point. Precisely where along that continuum the parties ultimately settle depends on who has greater mastery of various hard-bargaining tactics, as well as risk-tolerance and the power balance. Neither side "shows his cards" to the other and there is no discussion of what motivates either party or what truly concerns anyone involved in the deal. When people bargain hard from firm positions, any agreement reached will be based on compromise, giving-in, splitting-the-difference and horse-trading, instead of based on what each side really needed in the first place.

In deal mediation, positional bargaining is replaced by "interest-based negotiating" in which the negotiators discuss their true concerns and focus on their actual needs and wants, as opposed to making a series of concessions back and forth. After listening to and considering everyone's interests, the parties put their heads together to come to a resolution that meets those interests. The deal mediator is trained to help the parties work together in this regard, with the result being a more beneficial outcome for all sides and the opportunity to do the optimal deal.

PART 3: BENEFITS OF DEAL MEDIATION



What Does it Mean to do the “Best Possible Deal for Everyone”?

Deal mediation dramatically increases the likelihood that the parties will conclude a transaction that is “the best possible deal for everyone.” What exactly does that phrase mean?

This is best answered by way of example. Imagine a situation in which one side in a deal – Company X – gets absolutely everything it wants in the negotiation, while the other side – Company Y – gets enough of what it wants to do the deal but really wanted something additional. Let’s further imagine that the additional something – let’s call it a Widget – was something that Company X didn’t want in the first place and that it could therefore have given to Company Y without losing any satisfaction whatsoever. Economists refer to this deal as “inefficient” because Company Y could have been made better off without Company X being made worse off if Company X had simply provided the Widget to Company Y. In other words, X and Y did the deal, but it wasn’t the “best possible deal for everyone.”

A deal is “Pareto-efficient” or “Pareto-optimal” when neither side can be made better off without making the other side worse off. Most transactions are not Pareto-optimal because parties do not discuss their needs and interests with one another and because of information asymmetry. The term “information asymmetry” refers to the situation in which one party has more, better or different information than the other party. This is present in all areas of our lives, including dealmaking, and it causes inefficiencies because information required to do the best possible deal for everyone is not available. The deal mediator helps the parties avoid Pareto-suboptimal transactions by focusing on information exchange, encouraging interest-based negotiating, fostering discussion of pie-expanding options and identifying value-creating trades.

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PART 3: BENEFITS OF DEAL MEDIATION

How Does Deal Mediation Address Obstacles to Optimal Deal Formation?

Parties conclude sub-optimal deals all the time, usually unbeknownst to them. This occurs all around the globe, at all levels of business, every day of the year. Dealmakers overlook efficient trades – those that can make both sides better off – for a host of reasons. A skilled deal mediator will help the parties work through and around these barriers, providing the most productive negotiating environment, enabling the participants to find value-creating trades and helping to maximize transaction value. Some of the more prominent impediments that dealmakers face in reaching the best possible transaction are listed below.

What Gets In the Way of Forming the Best Possible Deal?

- Miscommunication between the parties
- Mistrust of the other side
- Conflicting negotiating styles
- Competition among negotiators
- Personality tensions among the dealmakers
- Failure or inability to discuss each side's true needs
- Fallacy of the Pie: A perception that there is a fixed value to be divided between parties, rather than a focus on creating more value
- A tendency to engage in hard-bargaining tactics (posturing)
- Lack of experience
- Carelessness
- Time constraints
- Internal pressures to perform
- High emotion
- Cultural differences

PART 4: BEFORE THE MEDIATION



What is the Profile of a Decisionmaker Who Chooses Deal Mediation?

Anyone in business who participates in dealmaking and is interested in maximizing transaction value can enlist the help of a deal mediator to oversee the negotiation process.

Choosing to negotiate a deal with the help of a neutral facilitator requires an enlightened and forward-thinking attitude toward contract formation. The reason is that most business people genuinely believe they are perfectly capable, even ideally-suited, to do their own negotiating and don't need any "help." The fact is, using a deal mediator is a sign of strength, not weakness. The choice to use a neutral third-party to facilitate a transaction reflects well on a decisionmaker, because it demonstrates an understanding that barriers to efficient deal-making exist everywhere.

There is no shortage of things that can impede one's ability to bargain most effectively and do the best possible deal. These include information asymmetries, strategic posturing, habitual old-school positional bargaining tactics, as well as emotions, biases and personality conflicts, to name a few. A deal mediator, who is objective in the transaction, can best help the parties overcome these barriers and consummate the optimal contract.

PART 4: BEFORE THE MEDIATION

At What Stage Should We Get the Deal Mediator Involved?

It's generally best to involve the deal mediator early in the negotiations because this will give the parties the greatest opportunity to formulate the optimal deal. However, in many transactions, the parties enlist the mediator at late stages primarily to break an impasse and avoid deal failure. Negotiations can deadlock at any time in a deal, and around virtually any issue, for example, when the principals are renegotiating terms in light of information obtained during the due diligence phase or when the attorneys are negotiating terms and conditions of the final agreement. In these situations, the involvement of a mediator can be of immense value.

Who Hires the Deal Mediator?

The parties together select the deal mediator, who must have no undisclosed connection to either side. A deal mediator is a neutral person hired by the parties to manage the deal process on their collective behalf.

Who Pays the Deal Mediator?

The deal mediator is hired by both parties collectively. The parties will usually split the cost of the mediator equally.

Does Each Side Have its Own Negotiator?

The deal mediator is responsible for the negotiation process itself, essentially representing the transaction, and works on behalf of everyone collectively. He is a neutral third-party and does not negotiate for either side. Each party will have its own negotiator(s) in the mediation, and it's the deal mediator's job to help all of the negotiators negotiate better.

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PART 5: AT THE MEDIATION

If I Allow a Deal Mediator to “Help” the Other Side, Won’t I Weaken My Negotiating Position and Give Up Something of Value?

The short answer is: “no.” I refer to this question as the “fallacy of the fixed pie.” Most negotiators see situations as a zero-sum game; that is, they believe that one side’s gain results only from the other side’s losses. This mindset can be roughly translated as: “The less he gets, the more I get.” Put another way, they see things in terms of a pie in which there is only a fixed amount to go around, and they negotiate “to win,” with their primary purpose being how to get the largest piece for themselves.

But the fact is, the pie is rarely fixed in business transactions, and it’s the deal mediator’s role to show the dealmakers that their negotiation is not zero-sum, that the size of the pie is not predetermined, and that by discussing their true needs and interests they can almost always find ways to create value. This means uncovering options for mutual gain and improving the outcome for everyone involved.

What if a Deal Mediation Ends Without a Deal?

At the mediation session, the negotiators will be presented with opportunities for making their deal and the mediator will encourage consideration of all options. The deal mediator’s job is to foster an environment in which the greatest number of proposals for efficient contract formation are put forth, but sometimes the options are not to everyone’s liking or what one party is willing to give, the other party is not willing to accept. If a deal mediation does not result in the formation of a contract, the parties are able to schedule additional sessions with the mediator or to negotiate among themselves once the session is completed. They are also free to walk away from the table and choose to do no deal at all.

PART 5: AT THE MEDIATION

What is a “Caucus” in Deal Mediation?

A “caucus” is a private meeting between the mediator and just one of the parties. When mediating disputes (as opposed to mediating deals), I tend to discourage the parties from caucusing because I believe that the transformative work of conflict resolution is done through the understanding that emerges when all parties sit together to discuss their differences. In deal mediation, however, I make heavy use of the caucus.

My experience is that parties in deal-formation are often highly concerned with sharing confidential information. As a mediator, I am able to receive confidential information from each party in a caucus and then determine independently if gains from trade exist. If the parties’ offers do not overlap, I will alert them to that fact. If, on the other hand, there is overlap, I will tell them so and a deal can be formed. Neither side is required to reveal its reservation price or offer concessions but they can avoid wasting resources as well as deal failure if the mediator is informing them that a deal is possible.

How Does “Brainstorming” Work in Deal Mediation? - Part I

Brainstorming is a technique used in deal mediation to expand the parties’ options. The process involves generating creative solutions through an open and unrestricted discussion in which everyone is encouraged to suggest as many ideas as possible to expand the deal pie and reconcile their interests. Brainstorming works on the theory that the most beneficial transaction will be uncovered as the parties’ identify and explore the greatest number of alternatives. In other words, the more options being considered, the greater the chance of success in reaching a Pareto-optimal agreement.

PART 5: AT THE MEDIATION

How Does “Brainstorming” Work in Deal Mediation? - Part II

In a brainstorming session, the parties are encouraged to think out loud and to suggest as many possible ideas for deal formation as they can conjure up, without committing to any particular idea and without assessing or critiquing anything that’s been suggested. This is a time to “road test” ideas and everyone is encouraged to offer up creative solutions, no matter how wild, and suggestions can build on one another while the mediator keeps track of what is discussed. Postponing evaluation of every idea that’s put on the table is key. While the session is ongoing, ideas can build on one another. Only after multiple options have been identified does the work of actually considering those options begin.

What evolves from a brainstorming session is a list of multiple possibilities for working through disagreements and adding value, many of which may not work, but that haven’t been judged or critiqued by any participant. Once the brainstorming session is over, the parties begin the work of considering whether any of those options are realistic and have the potential to satisfy everyone’s interests.

Brainstorming is a safe process in which everyone is encouraged to think out loud and to think “out of the box” by suggesting imaginative ideas, no matter how unrealistic they may be. By developing multiple creative options before evaluating them, possibilities expand, a solution emerges and the most efficient deal can then be formed.
