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Gary Friedman

Jack Himmelstein

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Resolving Conflict Together: The Understanding-Based Model of Mediation

Gary Friedman and Jack Himmelstein*

We are delighted to contribute to this volume of the Journal of Dispute Resolution honoring Professor Leonard Riskin, whom we have known, worked with, and learned from for more than a quarter-century. Professor Riskin has been a pioneer and guiding light in the field of alternative conflict resolution as it has evolved and come of age over the course of this same period. He brings insight and spirit to all his work, and his contributions have been, and continue to be, ground breaking. Students and practitioners, as well as those served by the profession, have benefited richly from the depth, breadth, and care of his thinking, teaching, and writing—as have we. It is a privilege and delight for us to be connected with him as a friend and colleague with whom we share so much. His work is a service of love to the many he touches and for whom his ideas and spirit provide such rich support. We look forward to more.

The following excerpt is from a book in progress—tentatively titled, *Resolving Conflict Together: The Understanding-Based Model of Mediation*—that is planned to be published in 2007 by the American Bar Association. In this book, we seek to set out the approach to mediation that we have been developing through our work with the Center for Mediation in Law (the Center). We have termed this approach the “Understanding-Based Model” of mediation. The book develops twelve mediation cases, in which Gary served as mediator and which, with commentary, serve to transmit our approach to mediation. Each case focuses on a different aspect of the mediation process. The excerpt here, which we call *The Publishing Case*, focuses on the role of law in mediation.

A note of explication is in order to put this case in context. This chapter is from roughly the middle of the book, and the reader does not have the benefit of the concepts and principles developed earlier. While it is not possible to provide that entire context in summary, we start with a brief summary of some of the salient aspects of the Understanding-Based Model. We also note that the chapter refers to several concepts developed at length earlier in the book. We hope they will be at least clear in concept.

Gary Friedman
Jack Himmelstein

* Jack Himmelstein and Gary Friedman are co-founders and co-directors of the Center for Mediation in Law (New York/San Francisco) and have together, in collaboration with others, developed the Understanding-Based Model of mediation and conflict resolution. They conduct training programs in mediation and mediative approaches to the practice of law in the United States, Europe, and Israel through the Center and also for a number of other educational and professional organizations including the Program on Negotiation at Harvard Law School and the ABA. Dr. Friedman is a practitioner of mediation with Mediation Law Offices in Mill Valley, California, and Professor Himmelstein practices in New York City

The Publishing Case

I. INTRODUCTION

A. *The Understanding-Based Model of Mediation*

Four interacting principles guide this work:

1. **Developing Understanding:** The overarching goal of this approach to mediation is to resolve conflict through understanding. Deeper understanding by the parties of their own and each other's perspectives, priorities, and concerns enables them to work through their conflict together. With an enhanced understanding of the whole situation, the parties are able to shape creative and mutually rewarding solutions that reflect their personal, business, and economic interests.

We therefore rely heavily on the power of understanding rather than the power of coercion or persuasion to drive the mediation process. We want everything to be understood, from how we will work together, to the true nature of the conflict in which the parties are enmeshed, where it came from, how it grew, and how they might free themselves from it. We believe the parties should understand the legal implications of their case, but that the law should not usurp or direct our mediation. We put as much weight on the personal, practical, or business related aspects of any conflict as on the legal aspect. In finding a resolution, we want the parties to recognize what is important to them in the dispute, and to understand what is important to the other side. We strive for a resolution to satisfy both.

2. **Going Underneath the Problem:** Experience has shown us that conflicts are best resolved by uncovering what lies *underneath* them. Conflict is rarely just about money, or who did what to whom. It also has subjective dimensions: the beliefs and assumptions of the individuals caught in its grasp, their feelings, such as anger and fear, the need to assign blame, and the desire for self-justification. There are also assumptions about the nature of conflict itself, which support the conflict and keep it going—like the theory of the exclusivity of right and wrong. And there are ideas about how conflicts must be resolved, such as the belief that the other person must change his position or that an authoritative third party must decide the outcome.

We need breadth and depth of understanding to hope to break out of such a complex and multilayered situation, what we call a "Conflict Trap." Repeatedly, we find that the basis for resolution comes from discovering together with the parties what lies at the very heart of their dispute, which is often a surprise to the parties, and which often has a profound affect on their work together.

3. **Party Responsibility:** This approach is also grounded in the simple premise that the person in the best position to determine the wisest solution to a dispute is not a third party, whether a court or judge or mediator, but the individuals who created and are living the problem. Therefore, we ask the *disputants* to assume the primary responsibility for working things through, and we ask that *they* work things through *together*. As we like to think about it: Let the parties own their conflict.

4. **Working Together:** When we promote working together, we mean that all meetings with the mediator occur with all parties present (including lawyers if they have a role). There is no caucusing, no shuttling back and forth; no secrets to

keep from one party or the other; and no private meetings, except for those between the parties and their counsel. Instead of being responsible for fashioning an acceptable solution, the mediator's job is to enable the parties to reach a mutually agreeable solution together.

We believe the impulse to work through conflict together is a natural part of the human condition, though it may be nascent, buried, or blocked. It is hardly recognized in the legal community, but we have seen it, waiting to be tapped and given room for expression. We have seen it succeed for many thousands of individuals and organizations, some of whose stories, like *The Neighbors*, make up this book.

The Center's model shares much in common with a number of other approaches to mediation. For example, we stress the importance of articulating interests that underlie the parties conflicting positions and developing solutions that will serve those interests. There is also much that distinguishes this approach.

B. Parties' Responsibility and Non-Caucus Approach

In the Understanding-Based Model, the emphasis is on the parties' responsibility for the decisions they will make. In this approach, the assumption is that it is the parties, not the professionals, who have the best understanding of what underlies the dispute and are in the best position to find the solution. It is *their* conflict and *they* hold the key to reaching a solution that best serves them both. Meeting together with the parties (and counsel) follows from these assumptions about parties' responsibility.

Many other approaches to mediation recommend that the mediator shuttle back and forth between the parties (caucusing), gaining information that he or she holds confidential. Our central problem with caucusing is that the mediator ends up with the fullest picture of the problem and is therefore in the best position to solve it. The mediator, armed with that fuller view, can readily urge or manipulate the parties to the end he or she shapes. The emphasis here, in contrast, is on understanding and voluntariness as the basis for resolving the conflict rather than persuasion or coercion.

We view the mediator's role in the Understanding-Based Model as assisting the parties to gain sufficient understanding of their own and each other's perspective so as to be able to decide together how to resolve their dispute. The parties not only know first hand everything that transpires, but they have control over fashioning an outcome that will work for both. They also participate with the mediator (and counsel) in designing a process by which they can honor what they each value and help them reach a result that reflects what is important to both of them. As mediators, our goal is to support the parties in working through their conflict together, in ways that respect their differing perspectives, needs, and interests, as well as their common goals.

To work in this way is challenging for both the mediator and the parties. The parties' motivation and willingness to work together is critical to the success of this approach. Mediators often assume that the parties (and their counsel) simply do not want to work together, and therefore keep the parties apart. In our experience, many parties (and counsel) simply accept that they will not work together and that the mediator will be responsible for crafting the solution. But once educated about how staying in the same room might be valuable, many are motivated

to do so. If the parties (and the mediator) are willing, working together throughout can be as rewarding as it is demanding.

C. Role of Law and Lawyers

Mediators tend to be divided in how they approach the role of law in mediation. Some rely heavily on what a court would decide if the case were to go to trial, authoritatively suggesting or implying that law should be the controlling standard used to end the conflict. Other mediators, concerned that the parties might simply defer too readily to the law and miss the opportunity to find more creative decisions, try to keep the law out of mediation altogether.

As developed in the excerpt that follows, in this model, we welcome lawyers' participation, and we include the law. But we do not assume that the parties will or should rely solely or primarily on the law. Rather, the importance the parties give to the law is up to them. Our goals are: 1) to educate the parties about the law and possible legal outcomes, and 2) to support their freedom to fashion their own creative solutions that may differ from what a court might decide. In this way, the parties learn that they can together reach agreements that respond to both their individual interests and their common goals while also being well informed about their legal rights and the judicial alternatives to a mediated settlement.

In these and other respects, the Understanding-Based Model seeks to utilize mediation's potential to resolve conflict in ways that honor the parties, their differences, and their relationship.

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II. ABOUT THE ROLE OF LAW AND "THE LEGAL CONVERSATION"

This mediation began with a call from Rob, the lawyer for Rick, owner, president, and CEO of a small publishing house, BookPro. Rob told me that his client was in a dispute with a writer, Charlene, whom they had under contract, and who was represented by counsel, Carl. I told Rob that I'd prefer to talk with both lawyers at the same time with permission of their respective clients. Rob had anticipated my request and with Carl's agreement and with their clients' permission, we scheduled a conference call for later that day. Carl, who seemed guarded and skeptical, introduced himself as representing Charlene, "who had published with BookPro and who had been under contract but was no longer." Rob quickly countered that the contract was fully in force. It was apparent that the status of the contractual arrangement between BookPro and Charlene was central to their dispute.

The lawyers explained that they and their clients had participated in several previous efforts to resolve this long-simmering dispute, which had taken a sharp turn toward litigation in the prior month. They believed it might be worth making one more try to see if they could avoid trial. I said that I was willing and briefly explained my approach to mediation, that we would work together, all the parties to the conflict in one room. I further asked the two attorneys to prepare a short memorandum that described how they saw the dispute from their perspectives, to send one to me, to exchange them with each other, and to share them with their

clients. They agreed. I received the two memoranda by the beginning of the following week. Our first mediation session was scheduled for two days later.

The memoranda gave some of the background of the dispute, as well as the lawyers' legal positions. BookPro had published three of Charlene's books as part of a series conceived by her. Their relationship was initially satisfactory, but sales fell off on the third book. Charlene was then approached by a larger publisher who was interested in her continuing the series with them, and she believed that she had the freedom to do so. Rick disagreed and said that according to the contract with Charlene, BookPro had a right of first refusal on all future books in the series.

The lawyers took diametrically opposite legal positions on this key issue. I imagined each had informed his client of the strength of their legal position and the relative weakness of the other, and that this legal context was central to the ways the parties were experiencing their dispute. Two days later, my hypothesis would be tested.

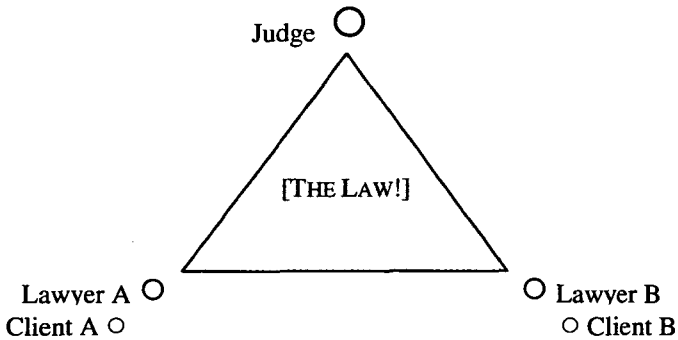
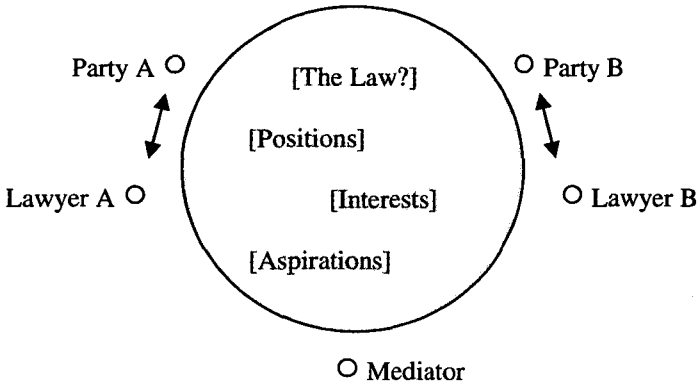
The nervous banter among the four people in the room came to an abrupt halt when I said, "Let's start." After the lawyers reviewed their previous efforts at settling, I asked why they thought they had been unsuccessful. I was met with short-clipped answers. Each side blamed the other for its intransigence. I had very little idea where they had gotten stuck before, other than in the blame game.

We talked generally about the mediation process. No one was particularly hopeful, but all would like to see if they could reach an agreement. We also agreed upon several ground rules, spending a significant amount of time talking about confidentiality, since there was a court hearing already scheduled. I then suggested how we might proceed through "two conversations."

A. The Two Conversations

Whereas the role of law in the traditional system is fairly clear—as the principal guide for judges in making and justifying decisions—its place in mediation is very much in question. As we see it, whether dealt with explicitly or not, the law influences or even directs the action from on stage or off.¹

1. Figures 1 and 2, which follow, describe concepts developed at length in earlier chapters of this book. Notes 2 and 3, *infra*, briefly summarize the most relevant information in order to facilitate understanding of the diagrams that they annotate.

Figure 1²Figure 2³

2. Figure 1 represents the traditional court-based, adversarial approach to disputes. Within the traditional approach, lawyers play the central communication role between their clients and the opposing counsel's client, and between their clients and the judge. As a result, lawyers occupy a position that separates their clients from the judge and from each other, represented by the clients' relative distance from the triangle of communication.

In this model, the law defines both the process and the substance of communication, narrowly defining the problem and solutions. Other factors that can prove essential in mediation, including the parties' underlying interests and aspirations, are absent. Instead, the law pervasively informs communication between the lawyers and, of course, between the lawyer and the judge.

The relative size of the circles representing the players describes pictorially the relative importance of that particular player to the process. The judge, whose role is to apply the law to the facts, is the most prominent. The judge's presence looms large even when lawyers negotiate on behalf of their clients outside the court as they "bargain in the shadow of the law" and advocate their positions by positing what a judge would do. The lawyers, then, are the second biggest players, with their clients ending up easily dwarfed in the traditional approach by the centrality of the roles of the lawyers and of the judge.

3. Figure 2 represents the uncertain role that the law plays in mediation. Numerous important factors, including the parties' positions, interests, and aspirations are all considered in addition to the law. This stands in stark contrast to the traditional court-based, adversarial approach, expressed in Figure 1, *supra*, where the law looms large over the Judge, the parties to the conflict, and their respec-

When legal action has already been considered or threatened, as in *The Publishing Case*, it's highly likely that the parties and their lawyers are comparing what might happen in the mediation with what would likely happen in court. The question isn't whether the law is involved. The question is how to deal with it.

Mediators have different ways of dealing with the law. Some simply urge parties to leave the law at the door (and their lawyers, too) before entering the mediation. These mediators are concerned that including the law is like bringing an elephant into the room. The power and authority of the law will inevitably dominate, making it impossible for the parties to focus on their real business and personal interests and priorities. In essence, these mediators keep quiet about the legal assessments they are surely making and collude in the pretense that there are no elephants for miles.

At the other end of the spectrum are mediators, some of them former judges, who weigh in with their opinion of what the legal outcome will be in court, and urge the parties to reach a settlement that reflects that opinion. This often works to resolve conflict in court, so why not in mediation? Or they may, by meeting separately with the parties and their counsel in confidential caucuses, point out the dangers in each side's legal strategy, in an effort to move each closer to the other's position. With these mediators, the law is dominant.

The Understanding-Based Model of mediation seeks to include both the legal reality and the business/personal reality. As we see it, the law is only part of the picture. It is for the parties to determine (with counsel from their lawyers) exactly how important a part it will play in their decision making. In effect, we hope to cut the elephant down to manageable size—no bigger or smaller than the parties want it to be.

In order to integrate the law into the mediation without it taking over, it's important that the participants understand that there are two realities—the legal reality and the business and/or personal reality. They may be interrelated, but they are not the same. To help the parties understand this, we suggest the need for “two conversations,” and seek to structure the mediation in a way that will include both.

Mediator: I think it might be helpful if we could clarify the legal reality before we move on to understanding the business reality. If that makes sense to you, I'll ask each lawyer to talk about what might happen if this case were to go to court, both in terms of the strengths of your case and the risks.

Rick: Why do you want to do that? That's where we've been stuck before.

Rick's voice betrayed a sense of impatience, drawing several silent nods around the room.

tive lawyers, and where the other considerations that are taken into account in mediation are often sidelined or ignored altogether.

The relative positioning of the parties in Figure 1 should also be noted. The lawyers occupy a position beside their clients, as opposed to between the client and the neutral, such that the parties may be directly engaged by the mediator without the lawyers necessarily being an intermediary between the neutral and the parties. The arrows represent the ability of the parties and lawyers to exchange places, allowing the mediator the flexibility to have Conversation One primarily with the lawyers, and Conversation Two primarily with the parties.

Mediator: Fair question. We don't have to, but I'd like you to know why I think it could be valuable.

Carl: There aren't many of Rick's statements that I agree with, but here I do. We've been through mediation before, and we spent a tremendous amount of time talking about the law, and all that did was polarize us. We'd like this to be productive, and I don't think it will be if we get into our legal postures and start shooting at each other again.

I had barely begun the mediation and not yet created relationships with anybody in the room, and they were agreed that my first suggestion out of the box made no sense. I could feel the tension rising in me, and had a strong impulse to defend what I thought was a good idea.

We've seen similar dynamics in mediation before. Parties with lawyers frequently come into mediation wanting to put aside the law to see if they can cut a deal with the other side that makes business sense. That is an impulse that we want to support, but we also know that parties, particularly when represented by lawyers, cannot and do not just throw the law away.

For Rick and Charlene, their lawyers' assessments of the likely outcome if they went to court provided a yardstick to measure whether a mediated result based on their business reality would be acceptable. What worried me was that if their lawyers had given them completely different predictions about the likely outcome in court, it would be much more difficult to bridge the gap of their expectations with any option that we created together.

But if you don't talk about the law at all, it doesn't simply go away. Indeed, it might, silently and unseen, prevent all the participants in the mediation from thinking more creatively about a solution. Paradoxically, giving the law its place in the mediation may keep it from looming so large.

We also differentiate between the role of the parties and of the lawyers in the mediation; otherwise, the lawyers may easily dominate. The lawyers will take the lead in the legal conversation (Conversation One). The parties, the experts in their own business and personal realities, lead that conversation (Conversation Two). If we didn't talk about the law at all, the lawyers would almost certainly feel compelled to add their two cents elsewhere in a way that could edge out their clients' active participation and keep the legal realities mixed up with the business realities.

It is for these reasons that we suggest having the conversation about the law first—so we can size up the elephant and know what damage it might do. Conceptually, we see this as part of Stage Two of the mediation, "Defining the Problem."

But the legal conversation is not my decision alone, and I had to acknowledge that it was Rick, not his lawyer, who had expressed impatience with any discussion of the law. And although Charlene's lawyer had responded for her, she didn't appear to be intimidated by Rick's lawyer. I decided to explain to the group why I felt that a discussion of the law might help the mediation.

Carl had given me an opening by saying that each prior effort had polarized them. I half hoped that the parties would be quick to realize how the ways their lawyers had sought to protect them had kept them locked in a "Conflict Trap." Like a knight in shining armor, I was now ready and optimistic about extricating

them. My goal was to develop understanding and reach agreement about how we would be working together.

Mediator: Given your prior experience in attempting to discuss the law, your reluctance to talk about it here makes sense. But it might be that your previous problems stemmed not from you talking about the law, as much as *how* you talked about it.

Rick: What do you mean? Rob made it abundantly clear that Charlene hasn't lived up to the promises she made in our contract. Then Carl attacked me and we were off and running. It was not only unproductive, it poisoned the atmosphere.

Mediator: So your lawyer set out his view that Charlene had not fulfilled the contract, Carl replied, and you ended up feeling attacked by him. Bottom line, no good came out of talking about the law, and it may even have made it harder for you, Charlene, and your attorneys to deal productively with one another.

Rick: That's exactly right.

Mediator: If you decided to talk about the law here, we would need to be clear about what we hope to accomplish by talking about it. My hope is that with each lawyer talking about not only your legal strengths, but also the risks you face going to court, we might be able to create fuller understanding and perhaps more convergence than you have now about what could happen. If we can do that, you'll be in a position to find better business solutions than you could by pursuing litigation.

Rob: I don't mean to be telling you how to do your job, but we aren't going to get anywhere talking about the law. We have precious little time to see if we can make this work, and I don't want to waste it by spinning our wheels. Besides, we already went through the legal aspects.

Carl: Rob, we didn't talk about risks. But I don't think it would be the best use of our time here to talk about the law either. We have a lot to work out to resolve this outside of court, and I'd like to get to it.

Mediator: So both lawyers think it's not a good idea to talk further about the law. How about you, Rick and Charlene? Would you find it useful?

Charlene: I'm willing to put it off for now. But it might make sense later, particularly if the lawyers are going to talk about risks.

Rick: I already gave my view.

Well, things don't always go as one would hope. I could see that I would be bucking the tide to try to go further now.

My concerns had not been much alleviated by our conversation so far. I suspected that neither lawyer was much interested in showing any legal vulnerability, so the two sides would likely stay polarized if we began the legal conversation now. My bringing up the law so early simply wasn't helping, although I noted that at least Charlene and her lawyer had registered that a conversation in which the lawyers assessed their legal risks might be of value. So we agreed that for now we would not discuss the law, although we would revisit that question later in the mediation.

As the mediation progressed, the following history emerged: Charlene had spent a year trying to market an idea she had for a book on parenting, entitled *The Adventure of Parenting*. Thirty publishers had rejected her proposal before she approached BookPro, Rick's fairly new publishing company. Rick offered Charlene a small advance, which she jumped at.

The book became very successful, resulting in a second book focused more specifically on the child's first years: *The Adventure of Parenting—From Years One to Three*. At the time the second book was published, Rick and Charlene conceived of a series on parenting, using a similar format to the first two books and covering the remainder of the growing up years in two- to three-year increments. As of the time of the mediation, three books had been published, all of them very successful, with more in the works.

But there had been a fall off in sales in the last book. Charlene blamed this on the failure of Rick and BookPro to put sufficient resources into marketing. Rick claimed the cause was a slumping economy and significant changes in the publishing industry. Meanwhile, a large publisher approached Charlene with an offer to publish the remaining books in the series for a big advance and a promise to heavily market and promote the books.

We were able to make a good amount of progress in the mediation, with each side exchanging proposals that at least narrowed many of their issues, but one issue remained intractable. Rick had entered into a contract with Charlene that he felt gave him the right of first refusal on all her future books on the growing up years. Charlene wanted to be sure that she had an out if she felt that Rick wasn't putting in a sufficient marketing effort to adequately publicize the books, particularly given the interest of the other publisher.

We were beginning to explore the question of the business/personal reality in terms of what was important to each that had led them to the positions they had staked out when Carl turned to Rick:

Carl: You have to understand that you can't lock Charlene into an exclusive with you for all books she publishes in the future, even if it's a continuation of the series that you've already published. Indentured servitude violates the Constitution.

Rob: That's not right Carl, and you know it. There is a clear commitment, spelled out in the contract for the first book and each subsequent one, that BookPro will publish the books in the series.

Mediator: This sounds to me like the beginning of a discussion about the law. Is that something you want to be doing?

Carl: I think it's necessary that they have a realistic view about this issue if we're going to make any kind of workable agreement, but I don't need to go any further with it right now.

Mediator: How about you Rob?

Rob: No, I just needed to be sure that everyone realizes that Carl is wrong.

Mediator: From my perspective you're both being very clear, but you are taking opposite views of the law. I want to say again that I think that it could be a valuable discussion for us to talk about the law, espe-

cially if you'll talk about both the strengths and risks of your legal positions.

Charlene: I think if we don't do that, we're just going to beat around the bush.

Rick: But we need to find a better way than before.

Here we were again, but with one big difference. Now the parties were motivated to have the conversation about the law. They hadn't been ready out of fear that it would quickly degenerate the way it had in the past. But now the failure to have a separate discussion about the law was impeding their efforts to continue the other conversation about their business and personal interests. My concern that not separating the two conversations might cause the two subjects to get mixed up with one another had become the reality in the room.

We return here to an essential point: that the mediator maintain bifocal vision, a focus on both the content and the dynamic, on the "what" and the "how" of the conflict. In so doing, I was able to hear the content of the legal point that Carl was making, and to see how it impeded Rick's and Charlene's conversation about personal and business interests, without adding any legal clarity.

Both parties were quick to realize and acknowledge that unless the conversation about the law were to occur, and to occur differently than it had previously, their ability to work creatively together toward solutions was likely to remain locked within the borders of their Conflict Trap.

Mediator: I know that you're worried about the discussion polarizing you. But if we can do it in a way that brings a fuller understanding into the room than you've had before, it could be productive. To achieve that, both of your lawyers have to be willing to talk about the risks you face. Otherwise, as I see it, we'll just have one more round of diametrically opposed legal positions with neither of you wiser as to how the law might inform your situation.

Carl: I'm willing to talk about risks, but I think you should know that there is very little risk to us in litigating.

Rob: There you go again. Our downside risk is also pretty low.

Rick (to me): You've got your work cut out for you.

Mediator (to Charlene and Rick): Both of your lawyers are working hard and are good at protecting you. But neither of them is saying that you don't face any risks in litigating. I think it makes sense if we ask each of them to clarify your legal strengths, and then talk about risks.

B. The Strengths of Each Side's Legal Position

The point here is likely obvious to most lawyers, particularly if they are looking at mediation from the outside. For the parties to have as full a picture as they can, which is our goal, it's important they understand both the strengths and risks of both side's legal positions. Lawyers are going to be more comfortable sharing their sides' risks if they have first been able to explicate their strengths. When we return to the dialogue, my challenge is to keep the focus on increasing the parties' understanding of the law and how it impacts the possibilities for the parties work-

ing together to resolve their conflict. I will, not surprisingly, use “looping” to gain that understanding.

With everyone in agreement, the legal conversation commenced when Carl invited Rob to begin.

Rob: Our position is clear. The contract for the first book had the standard clause giving Rick the right of first refusal on Charlene’s next book. The next contract, the one for the second book, has an addendum that gives Rick the right to publish all remaining books that Charlene writes in the series, spelling out the terms of the compensation as well, the royalty percentages, et cetera.

Rob read the addendum aloud: “All future titles to be published by author as part of the Growing Up series shall be published by publisher. The provisions of the agreement (earlier agreement) shall apply to all titles listed in the series.”

Rob continued: Our position is that Charlene is committed under the second contract for BookPro to be able to publish the entire series. If Charlene wants to write a book on some other subject than the series, she can pick her own publisher. And this is fair because Rick has made a huge marketing investment in the series. That’s why he’s entitled to be able to rely on this negotiated commitment.

Mediator: So you have two different arguments you would present to the court. The first is based on the terms of the contract and the second based on fairness. Your argument under the contract for the second book is that Charlene agreed to let BookPro publish all books relating to the parenting series. Second, if I understand you correctly, you would argue that Rick relied on that agreement and made marketing investments that he would otherwise not have made. Is that right?

Rob: Yes. But it would be sufficient to simply prove that the wording of the contract unambiguously spells out Rick’s right to publish future books under the same terms as the second contract.

Mediator: So you are satisfied that you would only have to prove that the language of the contract was clear enough to describe any other books in the series for the court to decide in your favor. The fact that Rick invested so heavily in marketing would only help to incline the court toward holding Charlene to the contract.

Rob: Not really.

Mediator: What am I missing?

Rob: Rick’s out of pocket marketing investment is evidence that the contract was unambiguous.

Mediator: So his marketing investment not only supports the argument that it would be unfair to release Charlene from the contract, but it also proves that the only possible interpretation of the contract is that Charlene is locked in to the whole series being published by Rick.

Rob: Right

Carl: When you read the second contract, it is not at all clear what all of the terms would be for future books in the series, so at the very least that is an ambiguity, which would be construed against the drafter of the contract, namely Rick. The original contract provided that Book-

Pro had a right of first negotiation for Charlene's next "book length manuscript." This right, as originally granted to BookPro, was limited to a right of first negotiation for one more book. If Rick elected not to publish the next book, or the parties could not reach an agreement on terms within a short time period, Charlene was free under their original contract to take any of her subsequent works to any other publisher.

At the same time the parties executed their second agreement, they also executed a Contract Addendum that provided: "the provisions of the earlier agreement with respect to the work apply to all titles listed in the series."

This contract addendum did not incorporate all of the provisions of the second agreement. That's so because later in the same agreement, there is a clause that provides BookPro with first negotiation/first refusal rights—not a perpetual option over anything that Charlene might write in the future. If they had meant to lock Charlene into all of the terms of the other agreement, they would not have added that clause.

Mediator: Your position is that the addendum only sets out an intention to publish the remainder of the series, but because a first negotiation/first refusal right was also part of it, there was an ambiguity created by having both clauses as part of the addendum. And as you see it, if there is an ambiguity, it means Charlene is not locked into BookPro publishing the remainder of the series.

Carl: Right, especially since Rick drafted the contract.

Mediator: You're referring to the law that the court will resolve any ambiguity against the drafter of the contract. The fact that Rick drafted the contract means that a judge would decide against him.

Carl: Yes. Besides, even if a court did conclude that there is a valid contract, it's unconstitutional. Slavery was abolished more than a century and a quarter ago.

Mediator: So, the essence of your argument is that a court would decide not to uphold the contract either because it's not definite enough to be a binding commitment, or because of a public policy against locking people into deals that would be too restrictive of their freedom.

Carl: We would also argue that the marketing investment by BookPro was paltry, especially when compared with the other publisher's offer.

Mediator: By comparing Rick's marketing investment with the offer by the other publisher, you would show that Rick hadn't made himself vulnerable in his commitment to the series.

Carl: Not exactly. We would be able to obliterate any sympathy that a court might feel for Rick since his marketing investment wasn't significant.

Mediator: Once a judge understood that the marketing investment was comparatively small, the judge would not be inclined to favor Rick.

Carl: Particularly when the basic freedom to publish is at stake.

Carl went on to elaborate more fully on previous court decisions that supported his argument. Rob responded with a more detailed explanation about the precedents that supported his view. I asked Rob and Carl whether they understood each other's arguments.

Rob: Of course.

Mediator: I think it could be useful for the sake of clarity if each of you could restate the essence of the other's legal argument.

C. Asking the Lawyers to Loop Each Other

Up until now, I have been inviting the lawyers to expand on their legal positions, and then by looping their arguments back to them, confirm that I have understood what they have said. This has not only helped clarify my understanding, it has helped assure the lawyers that at least the mediator understands their arguments. Having had a chance to put their arguments out more fully without the other lawyer immediately countering each point, and feeling understood, at least by me, they may be less insistent on repeating their arguments because they think no one is really listening to them.

Looping has served other purposes as well. It has slowed down the legal back and forth so that the lawyers get more of the other's arguments, and the parties may also be beginning to get a fuller understanding of the two positions. Asking the lawyers to demonstrate if they have understood each other, in effect to "loop" each other, goes further. Usually, when lawyers hear their counterparts present the arguments for the other side, they are mentally preparing their counterarguments—understanding the other's position only to the extent that they need to counter it. This has an impact on their clients since it subtly, or not so subtly, says: "You need not really listen to the other lawyer since we are right, and if it goes to court we will ultimately prevail."

Now the lawyers are being asked to do something that in many ways may feel counterintuitive for them, although they likely realize the sense of it: to allow the full picture to come out in a way that their clients can begin to understand it. For the clients, hearing their own lawyer articulate the other side's legal argument can be an eye-opener. They may even begin to realize that their belief in the soundness of their legal position as articulated by their lawyer, or the desire to hold onto that belief, may itself need examination. At a minimum, the lawyers' doing this task, which they can usually do quite well (although they sometimes need encouragement), is a significant step toward the goal of building a ground of understanding in the room where everyone as much as possible understands not only of his or her own perspective, but that of the other as well. After a little further exploration of the task and its purpose, the lawyers agreed.

Rob: Carl thinks he can prove that the contract is vague and because of that, Charlene is free to publish the remainder of the series with whomever she wants.

Mediator: Does he have it Carl?

Carl: Yes.

Rob: That did not apply to agreements by adults who knew what they were getting into.

Mediator: I know that you disagree with Carl's argument, but right now I think it could be helpful if you simply prove that you understand it.

Rob: I understand it all right. It just doesn't apply here.

Mediator: And what would you argue, Rob, if you were Charlene's lawyer?

Rob: I would argue that you cannot force a person to work for another. That since this series represented Charlene's major work commitment, it virtually amounted to an employment situation that prevented the employee from quitting.

Mediator: Does he get it, Carl?

Carl: Yes.

Mediator: What's Rob's essential argument?

Carl: That the second contract committed Charlene only to publish the remainder of the series through Rick, and that if there was any ambiguity about the specifics, the previous contract should be used as the model.

Mediator: Is that right?

Rob: As far as it goes. What tips the scales in our favor, if there is any question in a judge's mind, is that Rick's marketing investment was made relying on that commitment.

Carl: Yes, but it was an insignificant sum compared to what was already on the table from another publisher.

Mediator: That's your argument. What's his?

Carl: That for the size of the company, Rick's investment was greater than it would have been than if he didn't think that he would be publishing the remainder of the series.

Although a challenging task, this one was also relatively easy for the lawyers. I had to help keep in check their tendency to respond to their counterpart's arguments. But every good lawyer knows the arguments of opposing counsel. When Rob or Carl appeared to get stuck, I simply suggested that they imagine themselves the lawyer for the other side. This they could do fairly quickly and when they stated the other's views, it was likely not lost on the parties that the arguments of their trusted advocates were at least in part a product of which side they had been hired to represent. We were ready for a next step.

Mediator: Good. You've each done a good job of articulating your own legal positions as well as your understanding of the other's arguments. I'd like to know whether you're willing to take another step that we talked about at the start and look a little more closely at the risks you'd be taking if the case were to go to court.

D. The Risks of Each Side's Legal Position

Good lawyers usually want their clients to know the risks of their case as well as its strengths. It is less frequent that they are called upon to articulate those risks in the presence of the other side. I will have to show them the value of doing this exercise.

Carl: I don't see much by way of risk.

Mediator: Perhaps not, and you don't have to do this if you or your clients don't want to. My experience is that there is almost always some

risk, however small, and lawyers know that, although it may not be the norm to put that out to your counterpart. And if you lawyers simply trade your best arguments and counter-arguments back and forth, it will leave you where you've been until now, with your clients having less than the full picture and the atmosphere sullied. The whole point of doing this is to get past the exclusively adversarial exchanges and for your clients to have a more realistic sense of the likely outcomes that could occur in court.

Let me make a suggestion that may make this exercise a little easier, if you're willing to do it. I'd like each of you, Carl and Rob, to imagine that you've gone to court, presented your case, and disaster has struck. The court has ruled against you. Now your task is to explain to your client how this could have happened. If you are each willing, let's go back and forth, each of you sharing a possible risk.

I have stated the task in terms to which both lawyers can easily relate and which they cannot pretend could never happen. The clients listening to this suggestion are likely aware that for at least one of them, the imagined dialogue could become a reality.

Second, I have suggested that the lawyers take turns sharing their possible risks. This seems important to us here, where it was not when the lawyers were setting forth the strength of their cases, because of one of our strategic concepts: mutuality of vulnerability. If Rob began by sharing all the risks his client faced, and then Carl refused to match Rob with the same seriousness of purpose, then Rob could find himself, and his client, hanging out to dry. Mutuality of vulnerability—I'll share a little if you share a little—helps assure that will not happen and gives the process a chance to build toward, and through, a shared openness.

Rob: Since there's very little likelihood that I'll find myself in that position, I don't mind doing it.

Carl: I'm willing too, but you need to understand that we have nowhere to go but up. If we go to court and a judge doesn't buy our argument, and that is possible, we're no worse off than we are now. We're locked into a deal we don't like.

Mediator: You're talking now about the practical consequences of such a result, which I would also like us to explore, but I'd first like us to talk about the legal risks.

Carl: Fine. So understanding that we aren't risking any more negative situation than we're in now, even if we lose, I'm willing to say that, of course, there is some risk that we could lose.

Mediator: And how could that happen?

Carl: We could run into a conservative judge who wants to protect business interests and doesn't really give a damn about the Constitution's regard for individual rights.

Mediator: How could the judge justify that?

Carl: If a judge found that the contract was clear and didn't violate the 13th amendment, then Charlene could be faced with having to publish the remainder of the series through BookPro, or give up the series. I don't think that would happen, but it could.

Mediator: How could it happen?

Carl: If the judge resolved the contract's ambiguity by falling back on the terms of the second contract, even though that would be unfair to Charlene.

Mediator: If the judge felt sympathetic to BookPro as a small publisher, you could run this risk?

Carl: Yes, but it's a small one.

Mediator: Could that happen if a judge looked at the size of BookPro's marketing investment in Charlene compared to other books Rick has published, against what the large publisher was offering?

Carl: That's possible.

Mediator: How about you, Rob? What's the risk Rick is running?

Rob: If a judge were convinced that the books would do better with a larger publisher, that might tilt the scales in Charlene's favor.

Mediator: And the size of BookPro's marketing investment could be considered insufficient . . .

Rob: I don't think that would happen. But if you're asking whether it could, it could.

Mediator: Good. Carl, what else might incline a judge to rule for Rick?

Carl: A judge might think that Charlene's freedom to write about other subjects than parenting didn't represent a significant restriction on her work as a writer.

Mediator: That she still had the freedom to write in other areas. Rob, what else could happen that would lead a judge to release Charlene?

Rob: I guess if a judge were a libertarian, he or she could let Charlene off the hook.

Mediator: A judge more inclined toward a free market approach might find enough ambiguity in the contract to release Charlene.

Rob: It's possible.

Something very interesting had happened in the room. The lawyers were not revealing their innermost secrets or fears. They were simply acknowledging realities that were possible. They might not have used these exact words with their clients before, but they had very likely acknowledged that no case is 100% ironclad. So when Rick and Charlene heard the risks articulated by their lawyers, while they may have found it somewhat unnerving, they were probably not shocked.

But what was likely startling for each of the parties, and perhaps also relieving, was to hear the other lawyer, who had only projected the utmost confidence in the infallibility of his legal prospects, reveal chinks in his armor. And the chinks weren't all that small. As they spoke, one could imagine the reality they were describing actually coming to pass. There was a palpable softening in the room. It was hard for Rick or Charlene to continue demonizing the other's lawyer. It felt to me like the beginning of a different way of our working together.

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III. EDUCATING THE PARTIES

While possibly as valuable for the lawyers as it is difficult, the fundamental goal of this conversation about the law is ultimately the education of the clients. Until now, I have been “looping” the lawyers, which makes clear that I understand the points they have been making. And I helped them loop each other, which helps assure that at least they understand each other’s arguments. It is not clear, though, how much the clients have followed or taken in, and what questions they might have. After each lawyer disclosed a few more possible ways in which they could lose in court, I propose another step designed to assure the parties’ understanding of the legal reality, which is the central point of the whole exercise.

Mediator (To Charlene and Rick): Do either of you have any questions about the risks we’ve just described? The purpose of this conversation about the law is to educate you about the legal realities of your case. So if you have anything you want clarified, please ask.

Charlene: Why didn’t or doesn’t Rick put more resources into marketing the series? It would have put him in a better position legally. More than that, it would have avoided this whole problem.

Rick: Can I show you how much we did put in? I’ve put together a comparison of our marketing investments in the parenting series with what we put out for other books.

Mediator: You both seem anxious to talk about this issue, and it may well be at the heart of your conflict. In fact, it may be a significant factor that a court would take into consideration if the matter were to be resolved there. But before having our second conversation based on your business and personal interests, I want to be sure that you both feel you understand the legal reality. Does it seem clear to both of you what your lawyers’ arguments would be if you went to court, and what risks you would run?

Rick: Not to me. I don’t understand this business of the Constitution and indentured servitude applying to this situation.

Carl: If I may, Rick, with your counsel’s permission, the reality is that if you were to have your way, Charlene could only publish parenting books with you under terms that you decided before the books became as popular as they are now. You, on the other hand, could decide tomorrow that you don’t want to publish any more books by Charlene, and she would have to live with that. There is no mutuality in that. People’s right to work wherever they want and to freely bargain for that is protected by the 13th Amendment.

Rick: But we entered into the second contract freely. Don’t people have to live up to their commitments?

Rob: Exactly the point.

Mediator: You are pointing out why you think the constitutional argument shouldn’t be persuasive. You don’t have to agree with the argument, but do you understand it?

Rick: Frankly, I’m offended by it, but I understand it.

Mediator: How about you, Charlene? Do you understand the arguments?

Charlene: Yes, I think I do. But you cut us off from talking about the marketing investment. And I believe that's the nub of the issue.

Mediator: It may be, and it's an important discussion for us to have. But I don't want to mix it up with the discussion about the law. If we have as much clarity as we can about the legal reality, I think it will be easier to put it aside when we return to the other conversation that you're eager to have. Is that okay?

Charlene: Okay, but can we get to it quickly? I find talking about the law intimidating.

Mediator: It can be, and I'm asking you to stay with it in an effort to make it less intimidating by cutting it down to size. It looks to me as if there are two competing principles underlying our discussion. The first has to do with people's freedom to choose their work, the people they work with, and the terms of their work. The second has to do with respecting obligations that people have entered into, and not releasing people from those obligations just because a better deal comes along. (To the lawyers) Do you think I've accurately described those principles?

Rob: Yes, but they're not on an equal plane. The courts aren't about to let people run away from their commitments because of the principle of freedom. Business would be paralyzed if obligations weren't respected.

Carl: Likewise, people can't be held to their commitments unless the full implications are spelled out with a specificity that everyone understands. You can't force people to work together.

Mediator: You may disagree with each other over which principle the court will consider more important in the context of this case, but do you agree that those are the principles that the court would be weighing.

Rob: I agree.

Carl: So do I, but the facts would make a difference.

Mediator: And one of the crucial facts that Charlene and Rick were about to address is the extent of the financial contribution by BookPro to the marketing of the series, within the circumstances of the arrangement between the two of them.

Carl: That's a central one.

A. The Principles Underlying the Law

The goal of the legal conversation is to make the legal reality comprehensible to the parties. Providing a structured way for the lawyers to talk about the strengths and risks of the case, as we did here, is designed to give the parties a better grasp on how their dispute might proceed in court, and to create some greater convergence between the lawyers about what the likely outcome would be.

Another way to make law understandable to the parties, and thereby reduce the elephant's negative impact, is to work with the parties and their lawyers to identify the principles that underlie the statutes and rules. Ultimately, courts are struggling with human tensions and human dilemmas and seeking to resolve them through the application of human principles. The principles may have become calcified in their application over time, and the language used to express them

become arcane, or at least specialized. But the principles are there for the finding, and finding them and articulating them in a straightforward manner can be a revelation to the parties. It can humanize the law and make the connection between the two conversations more understandable.

Charlene: So the court would be looking at the same things that we want to talk about.

Mediator: Exactly. But the court would be much more restricted in how it looked at it. While a court is likely to struggle with many of the same concerns that you and Rick are dealing with, the judge is more bound by rules in reaching its decision than the two of you are. And the court would obviously be less familiar with what is crucial to the two of you than you are. Conversely, if the two of you are going to decide this case, you are both intimately familiar with the past and present of your situation. And you'll have control over the outcome based on what you each consider important. So I completely support the direction you both seem to want to take.

Charlene: That's helpful. I think we've already paid a price—and frankly, Rick, the fact that you're seeking to bind me legally hasn't made me any more trustful. I know that I've been more guarded with you and afraid to talk about some ideas I've had because I've thought you might exploit my suggestions.

Rick: And, as you can imagine, knowing there is the risk that you'd be publishing more books in the series with someone else has made me reluctant to invest more in marketing. I need some peace in all of this. I need to know I can count on several more years of publishing the whole series in order to create a comprehensive strategy for maximizing sales. I can't do that knowing you're threatening to get out.

Charlene: And I need to know that I am not locked in for life to you as the publisher if I don't think you're getting sufficiently behind the books.

Mediator: These are the underlying issues between you, and the ones a court would ultimately address as well. And your individual concerns are very important. You have now begun to talk about the personal and business realities that also underlie the legal reality. But before we go further into this, I just want to be sure you both feel satisfied that you understand the legal realities we've been talking about.

Charlene: I think I do.

Rick: I don't have any more questions for now.

Mediator: There is one additional aspect of the legal reality that I think you should understand before we turn to the other conversation, and that is what it would mean to go to court *practically*. If we can spend a little time clarifying the practical consequences of litigation so you both know where that would leave you, it will help us considerably when we get to thinking about possible solutions.

Charlene: I'm willing to stay with it, but I hope it won't take too much longer.

Mediator: I don't think there will be any big disagreements here, and with your lawyers help, I think this part can go fairly quickly.

Rick: I'll hang in, but I agree with Charlene that we need to have the other discussion today.

B. The Practical Consequences of Going to Court

This is the third aspect of the legal conversation that we want to have with the parties, after discussing the strengths of each side's case and the risks. Lawyers and their clients are often so focused on the rightness of their legal position and what they have to do to win in court, they don't consider what's at stake if they lose, which is what the parties have just done. They may also neglect thinking about the practical consequences of going to court, not only if they lose but even if they win.

Again, the goal is to make the "law" comprehensible to the parties in terms of the legal processes and their impact, and the judicial decisions that could result. Usually, the benefits and costs of those processes are measured in terms of time spent or saved, financial reward or costs, diversion from goals or the ability to achieve them, opportunities secured or lost, reputations enhanced or tarnished, and relationships preserved or breached.

While lawyers and clients may have touched on these elements in their discussions, it is often surprising how little they have actually considered the practical consequences of their battle. We're not trying to convince parties that litigation is always bad, as some mediators maintain. Our goal is for the parties to see and understand the legal realities so they are in the best position to assess their priorities and the choices they may make together.

Mediator: Carl and Rob, if it's OK with you, what are the practicalities if your clients went to court?

Carl: Well, first, we would seek a declaratory judgment from a court that would release Charlene to enter into a contract with another publisher. Otherwise, no publisher would touch the book.

Mediator: What would that entail? How long?

Carl: I think since the case would go on "fast track," we could get a decision from the court within six months.

Mediator: And if they lost and appealed?

Carl: Two more years.

Mediator: And if you won, what would you get?

Carl: We would get a judge to allow us to publish the book with another publisher who would be willing to pay her more. It's possible that we would get attorney's fees, especially if the other side appealed and lost.

Mediator: And the cost of that?

Carl: For the trial, somewhere upwards of \$25,000, maybe up to \$50,000 on appeal.

Mediator: And what other practical consequences would there be? What would be the impact on the book and the series?

Carl: Most important, Charlene would get a big advance from the new publisher and stand a chance to make a lot more money because she would also get a higher royalty.

Mediator: What about the delay? What effect would that have?

Carl: That might be a problem. Charlene's series reached a high volume of sales last year and there's been a downturn since then, we think largely because of inadequate promotion. We could lose the market if we wait too long. But that would hurt them more than us.

Mediator: How so?

Carl: If Charlene doesn't put out a new book pretty soon, it will impact the whole series' sales.

Mediator: Rob, what would be the impact on Rick of litigation if you won?

Rob: In terms of cost and time, I think that Carl has it about right.

Mediator: That there would be parallel impact on Rick and BookPro.

Rob: Right. But I think that by preventing Charlene from going to another publisher, it would be a wakeup call for her and could give her an incentive to get back to work with Rick. There is no question that we would appeal if we lost, and I do think that it would doom the series. Rick is not about to put any resources into the series until the litigation is resolved, and with a fast-moving market, the series could become history quite quickly.

Mediator: So the delay might doom the series. And that would be bad for BookPro and Charlene.

Rob: Right. But Charlene's going forward with another publisher would also doom the series with BookPro, and in addition, would reflect badly on Rick and the company.

Mediator: In that respect, let me ask both of you, what would be the impact of the publicity from the litigation?

Carl: I think that Rick would suffer. The publishing industry is pretty vulnerable and Rick would not only be out the time and money of litigation, but the public may well side with Charlene. I know that's not good for Charlene either, since she couldn't force Rick to market the series. But it could be that the publicity would keep the series in the public eye and help sales.

Rob: But once other publishers knew Charlene was in litigation, she'd get the reputation of being trouble, and I think no one would want to touch her. There are some significant upsides if we win—the security of knowing the rest of the series would be published by Rick.

Mediator: And would there be any downsides to your winning?

Rob: There is always some inevitable fallout from going through litigation. It's not a pretty process, and it could damage their relationship. That's why we're here.

Mediator: And from your client's perspective, I imagine that could make this a pyrrhic victory. He would have the right to publish Charlene's books, but Charlene could decide not to write them. Or at least a strained relationship could impair the product and scuttle any positive personal aspects of their interaction.

Rob: Of course.

Mediator: Are there any other practical consequences you can think of?

Rob: The delay in moving forward that this controversy has created is a definite drawback to both sides.

Mediator: How so?

Rob: We're losing momentum by focusing on the litigation rather than going forward with the series. Losing even more time might kill the series.

Mediator: So even if you win, if the relationship between Rick and Charlene hasn't been poisoned by the litigation, the window of opportunity for the series might be lost or at least impaired?

Rob: Change is quick in this business.

Rick: And I have to say, at least from your perspective, there are a lot of other opportunities we're missing, right now, to exploit the series, by putting our heads together, thinking about Internet possibilities and other kinds of products that could be coming out of the series.

Charlene: I've been saying that right along. What I've really wanted is for you to put more of your resources into getting behind the series, and that has been a source of my greatest frustration.

Mediator: And if you lose the litigation, that could be even harder. And if you win, you'd have to deal with another publisher knowing that any marketing investment in the series would be benefiting Rick.

Carl: There's no question that litigation has a lot of lose-lose effects. I think we all know that. Can you imagine what it would be like for the other authors in Rick's stable to see him try to coerce Charlene into staying with him? I think it would be worse for Rick than Charlene.

Mediator: There is some disagreement about what the specific consequences might be, but you do agree that going through litigation runs the risk of making the result moot. That is, you could lose your market by the delay. It's also clear that you'd both be hurt by the uncertainty surrounding the outcome and would not be able to do anything with the series or the next book until the litigation was resolved.

Carl: I think we can agree on that.

Mediator: Good. Unless you, Rick, or Charlene, have any questions about what we've just discussed, I think we can turn to the second conversation.

We had reached another interesting point in the process. Both lawyers had conceded that there would be risks to their client if they proceeded in court and, more significantly, even if they were to win in court. This is not an uncommon phenomenon. Often, lawyers and their clients get so caught up in the legal fight that they ignore the bigger picture. In fact, many trial lawyers feel that to even think about a negotiated result makes them less effective as advocates. Many business executives increasingly turn to mediation precisely because they know that win or lose, legal struggles will be a diversion to business priorities. In this case, the lawyers supported the mediation process, but neither of them had apparently had such a full exploration with their clients of the consequences of litigation.

Litigation was still an option for them if we were not able to find a better solution. Even though there were significant differences in the lawyers' assessment of the litigation risks, there was quite a bit of agreement about the negative conse-

quences for both if they won. That would make our job much easier when we moved to a discussion of the business reality to find solutions that would leave both Rick and Charlene better off than if they proceeded with litigation.

Now that it was finally time for the business and personal conversation, the law moved to the background and Charlene and Rick were able to discover and explain what was important to each of them. For Rick, it was the peace of mind that would come from knowing that he could make a viable publishing and marketing plan for the remainder of the series and that he could count on Charlene to work together with him toward that end. For Charlene, it was knowing that Rick would commit the necessary resources to give the series its best chance for long range success, and the ability to be able to leave if she felt that Rick wasn't sufficiently forthcoming.

That discussion led to Charlene and Rick negotiating an agreement in which Rick would remain Charlene's publisher for the next four years, at which time it would be determined whether or not they had reached minimum preset sales targets. If those minimums had not been reached, Charlene would have the option to find another publisher. This gave Charlene the out she wanted so that she wouldn't feel that the series was doomed if Rick didn't market it effectively, and it gave Rick the peace of mind he needed to make the next four years as productive as possible. The lawyers played a major role in helping Rick and Charlene determine a workable method to measure success that would be legally binding. While the legal reality never loomed as large again as it had at the beginning of the mediation, it had played an important role in uniting Rick and Charlene in their efforts to find something likely far better for both of them than pursuing a court decision.

C. Bringing in the Law

On the subject of bringing in the law, there are two related but distinct challenges for the mediator, the parties, and their lawyers: whether the law will be addressed in the mediation and, if so, how it will be addressed.

Since we seek to place the parties in a position to make informed choices about their decision making, we want them to have as full an understanding as possible of how the law might inform those decisions. There are several cross currents that complicate that task, and several aids we have found to deal with the challenges.

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IV. MAKING THE LAW PEOPLE-SIZE

Given law's authoritative voice in our culture and in most of our psyches, the very inclusion of law or even the attempt to include it can impede the parties' ability to make decisions together that reflect what's important to both of them outside the law, and when their respective lawyers give them disparate predictions as to how a court may see their dispute, the parties may find themselves caught in a legally bounded Conflict Trap. Both may believe they can do better in court, and that the other side is being less than straight forward. These mutually reinforcing views leave them deadlocked. This being the case, they may decide that

they best “leave it to the lawyers.” In these ways, the law can become all consuming and overwhelming.

In order to make the law people-size, the mediator needs to help the parties distinguish the *legal substance* of the dispute from the *legal impact* of the dispute. Legal substance: These are the rules or statutes that govern our legal relations with one another. Since the parties are not usually lawyers, their gaining a fuller understanding of how the law sees their dispute proves useful. Rick’s understanding how the 13th Amendment might potentially bear on their dispute reflects a matter of legal substance.

The legal impact has to do with how the parties experience their dispute because of how they and their lawyers deal with the law. The impact of previous efforts to talk about the law was to make Charlene and Rick loath to ever have such a conversation again.

As the parties became educated about the impact the law was having, even when it was barred from the discourse, they were more open to seeing if there might be more constructive ways to deal with the differing views of legal substance.

Many lawyers, parties, and mediators, particularly lawyer-mediators, approach the question of law as exclusively one of legal substance and thus ignore the destructive power of impact. In fact, the complexity and intricacies of the substance of law that may dazzle in the point and counterpoint exchanges between lawyers often conceal the impact of those exchanges on the parties or one another.

A. Reference Points for Decision

The “two conversations”—one about the law and one about the parties’ business and personal reality—communicate in a very real and sustainable way that there are different bases on which the parties make their decisions. These include:

- Sense of Fairness
- Interests and Needs of Parties and Others
- Relationship
- Law and Underlying Principles
- Practical and Economic Reality
- Prior Agreements
- Other

The mediator who understands where the parties are coming from may be able to help free them from the legal reality’s restrictive grasp. Parties to conflict quite naturally approach their dispute from different reference points. To one party, the practical and economic reality may be the most important consideration; to another it is the relationship; to another it is other needs and interests; some turn to the law for their best result. It all depends on their different perspectives, values, and priorities.

V. THE IMPORTANCE OF INCLUDING THE LAW

Not only is it helpful for the mediator to understand the different ways the law can be useful in mediation, it can be extremely valuable for the parties (and their counsel) as well. The more clearly the parties see how law might inform

their choices, the more empowered they are in relation to the law, allowing them to modulate the intensity of the law, certainly as far as its impact goes. That knowledge makes the law only the law.

A. Reasons to Inform Parties about the Law

Comparing What Will Happen in Court: A central value of mediation is for the parties to decide on a solution that will serve them better than their other alternatives. Whether or not they seriously entertain the possibility of going to court, what a court would likely do provides a principal alternative in the minds of most parties and their counsel. Our Understanding-Based Model wants the parties to have enough information about the legal alternatives to be able to compare it to what they're considering in mediation.

The problem in most business mediations (where counsel are usually present) is not that the parties lack information about what would likely happen in court. The problem is that they often have received information sufficiently skewed by their advocates' opposing perspectives that they hold widely divergent views of likely outcomes. These divergent expectations keep the parties stuck in their Conflict Trap. Why should they settle if each side believes there is a good chance they can do better in court, and believes the other side will ultimately see the truth of this?

Having the legal conversation within the mediation with both parties and their counsel present can be extremely enlightening for the parties. In *The Publishing Case*, it breeched, or at least lessened, the gap created by counsels' diverging views. The very act of working together to close that gap is itself a way out of the Conflict Trap: the parties realize they both expect they will do well in court, and it is unlikely that they are both correct. Now, rather than glancing back over their shoulders in the direction of the courthouse, they may turn toward one another to look seriously at what they can accomplish in mediation.

Understanding One's "Legal Rights": Many parties in conflict, whether or not they are thinking in terms of going to court, measure what they feel they deserve or would consider a fair resolution of the conflict in terms of their rights under law. For some disputants, this can also prove enormously empowering, since the law often provides some check upon one party to a conflict taking advantage of the other. Understanding their rights can therefore prove critical to parties being able to make informed decisions. Even when parties are represented by competent counsel and the mediator can assume they are informed of their rights under the law, it can still make a critical difference to have the legal conversation in the open when everyone hears the same thing.

Ironically, an open acknowledgment of both parties' "rights" often helps the parties move beyond an exclusively rights-based focus to the resolution of their conflict. It can also lessen the mystique of the law by making the legal information clear and much more within the parties' mutual control.

Fairness, Justice, and Right Relations: It is not uncommon for parties and/or their counsel to view any discussion of the law as a distraction from their considering their underlying needs and interests, and seek to avoid it altogether. A common stance is that the law need enter in only when the parties to a dispute cannot work things out directly. In that scenario, the law remains in the background not only as a fallback, but as a threat—and threats, even when relegated to

the background, can interfere with parties' willingness and ability to collaborate on a way out of their Conflict Trap.

While the law *may be* used as a threat, and/or be perceived as such, it does not automatically follow that it *must be* used or perceived that way. An alternative is letting the law be a useful guide for understanding how society struggles to deal with legal disputes in terms of fairness, justice, and right relations as these very human concerns intersect with the personal, relationship, and/or business dimensions that are at the core of any dispute.

The Principles Underlying Legal Categories: It can often prove enormously helpful for parties to understand the principles that underlie the legal rules that apply to their dispute. These principles frequently parallel aspects of what the conflict is about for the parties at a deeper level. Making those principles explicit can help the parties have a fuller understanding of what is at stake for both of them in their struggle. In the legal conversation in *The Publishing Case*, Charlene and Rick were better able to understand the law when they saw that that the courts would likely look to two principles: the need to protect individual freedom, as well as the importance of honoring commitments made in business relations.

Reinforcing Agreements Made in Mediation: Finally, there are two ways that having an open legal discussion can protect and reinforce agreements that parties enter into in mediation. First, in a significant number of jurisdictions, if a party was uninformed of legal rights when entering into a legal agreement that ended a dispute, that legal agreement may be voidable in court. Second, when parties choose to enter an agreement that differs from what they believe a court would have done, the fact that they choose differently, knowing the law, may actually reinforce their commitment to their agreement.

B. Notes on the Legal Conversation

The legal conversation is aimed at educating the parties about what would likely happen if they were to seek to resolve their conflict in court. The tricky part is to help them gain that understanding unskewed, to the extent possible by the usual distortions of the adversarial lens.

As we've seen, we focus on the strengths of each side's legal position, their risks, and what will be the practical consequences of going to court. We comment here on several additional considerations that inform our work with lawyers and parties going through this sequence.

1. Strengths

We lead with strengths for obvious reasons. It is the starting point for many lawyers and parties and the place where they are most comfortable starting. If we want to explore the possibilities of moving beyond where the dialogue has been, it is good to know where we are.

Some lawyers want the opportunity to clarify their arguments in writing, as they would with a court, and we encourage them to compose short memoranda that describe how they see the dispute from their perspectives, send them to us, exchange them with each other, and share them with their clients. We urge them to try to simplify their presentation for these purposes.

Some want time to make an oral presentation, akin to what they might do in court. If they do, we discuss that approach with them and their clients, again trying to keep the task fairly simple and straightforward, with the goal of educating the parties' foreground. We may all agree to limit such presentations to a specific time frame.

In the legal conversation, the mediator takes time to understand (by looping) the strengths of each side's legal argument. Asking the lawyers to loop each other's legal positions, as in *The Publishing Case*, the goal is to promote understanding of differing perspectives, rather than to convince the other of the unsailability of one's views. The process we call "looping" also helps clarify confusions, sometimes for the lawyers, sometimes for their clients, and not infrequently for the mediator. It also slows things down and helps simplify what might seem complicated. Giving the parties the opportunity to say what they have heard and to ask clarifying questions of their lawyers further promotes their understanding.

2. Risks

Asking each side to expose its risks can be asking a lot. People in general are wary of making themselves vulnerable, particularly in front of those who could take advantage of them. That is certainly true of lawyers, only more so, given their professional tendency to be risk averse. Setting out a possible weakness of their case is at best counterintuitive. As more than one lawyer had said to us, "I'm not going to do the other side's work for them." In this way, lawyers stay caught in their own knee-jerk, adversarial Conflict Traps and keep their clients stuck there as well.

For this task to work, it needs to make sense to the lawyers. The mediator's work is to help the lawyers see that sharing the risks of going to court may be in the best service of their clients. Each lawyer posturing that victory in court is virtually assured actually exposes their clients to a different risk. To the extent the parties maintain unrealistic and divergent views of what would likely happen in court, the chance significantly increases that they will fail to reach a mutually agreeable resolution. As we are fond of saying to the lawyers, there are risks both ways.

The mediator can also guide the effort of sharing risks in ways that reinforce its making sense. For example, we ask for alternate disclosures: one risk from one lawyer and then one from the other. This process of mutuality of vulnerability builds a confidence in the process, as the lawyers start with small risks and see if they are met before setting out a more significant one. It also avoids what could be a very problematic and distorting result that would follow if one side made a serious effort to present the risks it faced in going to court, and then the other said glibly that they really had none. For sharing risks to make sense, mutuality counts.

3. Practical Consequences

Exploring the practical consequences of going to court is essential, and often disarming. Surprisingly, we find that many lawyers have not spoken in depth with their clients about what would really follow from seeking to resolve the case in

court. They haven't even talked about the implications of what would follow from a legal victory. The question of where "success" might leave the parties can prove enlightening to both as they think through, in one another's presence, some of the real life possibilities that they may not have previously considered.

VI. WHOSE DECISION IS IT?

What happens if one or both parties simply do not want the law to be a part of the mediation? They want to make their decisions ignorant of the law or at least absent any explicit discussion about the law. On the one hand, our goal is that the parties be fully informed. On the other, we want to put the parties front and center in decision making, including the decision about how they work together to resolve their dispute. We want to respect their autonomy. So we give the parties an opportunity to be informed about the law, but let them know it's their choice. If they decline, as Rick and Charlene did, we urge them again when it becomes clearer that their failure to understand the law may be keeping them caught in conflict.

While we don't pretend there is always a simple and ready solution, we rely on another principle—reaching agreement on how we are going to work together. That agreement includes both the parties and also the mediator. We let the parties, and their lawyers if present, know how important we think it is to have the conversation about the law. The conversation cannot take place without the parties' agreement, nor can it be abandoned without the mediator's agreement.

We put out what we view as important in the process very early, at the initial contracting stage, saying we believe parties need to understand their legal alternative in order to make informed choices, and that at some point in the mediation there will need to be some discussion about the law. We also discuss the Two Conversations approach when making agreements about how we will work together in the mediation. When lawyers are present in the mediation, as they were in this case, we prefer that we address the law (Conversation One) first.

Our general experience is that a good number of attorneys are more comfortable moving back from center stage and allowing the parties to have the business/personal discussion after they've had their time at the fore. Whether this is because they feel protective of their clients, or the result of professional habit, lawyers usually want to go first. Also, parties generally come into mediation with the legal reality and the personal/business reality intertwined. It's often impossible to have the personal/business conversation with the parties until the legal context is established.

Clarifying the legal reality for the parties is a great incentive to have the business/personal discussion that follows. With the two conversations clearly separated this way, the task of each is clearer, and once the parties have a clearer sense of the legal reality, including the attendant risks and costs of pursuing the legal option, they are primed to see if they might do better by looking at their conflict through a different lens.

Finally, the legal reality is infused with notions of right and wrong, with winning and losing, persuading or convincing one another. Since the ground of our approach is to seek to resolve conflict through understanding and agreement rather than winning and losing, the notions of right and wrong may prove less central. Indeed, much of what we do in mediation is to educate the parties about the re-

strictive hold these ideas may have over them, and help them break free. By moving systematically through the legal conversation, this work with the lawyers establishes a shared, rather than oppositional, view of the legal reality.

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VII. WHEN THE PARTIES ARE ADAMANTLY OPPOSED TO KNOWING THE LAW

What's a mediator to do if the parties oppose bringing in the law, as Charlene and Rick (and their lawyers) initially did, and the mediator continues to think it important that they be informed about the law? The cases fall along a continuum. At one end are those where both parties are represented and fully informed about the law, and at the other, the parties without lawyers or legal knowledge.

At a minimum, we urge parties to use counsel as consultants to the mediation, and to consult with their counsel both early in the process and at a later stage. Early in the process, the parties will gain the benefit of their lawyers' perspectives on how the law might look at their problem and how a judge might view it if the dispute were to go to court. Later, the parties can use counsel to compare any agreement they reach against the reference point of the law, and to help draft a legal contract to formalize their ultimate agreement.

In a case where both parties were represented by competent counsel, and both assured us that they were fully informed about the law, and we were comfortable that that was indeed the case, we would likely agree to work without a conversation about the law if all parties wanted to proceed that way. But we would probably urge them to reconsider and would stay vigilant to the possibility that misimpressions about the law were undermining their ability to move forward.

In a case at the other end of the continuum where the parties are unrepresented and without legal knowledge, the mediator can introduce the law in terms of his or her understanding of what a court is likely to do, which a lawyer mediator who has knowledge of the particular field can readily do, or the mediator can recommend the parties hire as a consultant an independent lawyer who is an expert in the field. If we could not reach an agreement with the parties about how the law could be introduced, we would likely not agree to serve or continue as mediator.

A. Remember the Essential Point: Focus on the Parties' Understanding

Bottom line, the essential point of the entire exercise of the legal conversation is to make the law "people-size" or, more precisely, "party-size." We want the parties to understand how the law might apply to their conflict so that they can give it as much or as little weight as they choose in the decisions they make together. We are constantly aware of the distorting potential of the legal lens, and we work hard to give the parties the means to use the "the control knob" over the disempowering intensity of that lens. We do this in a variety of ways.

In terms of the content of the law, we often ask the lawyers to slow down or to state in plain English some of the concepts spoken in classical legalese. We may try to translate ourselves by looping in straightforward language what the lawyers are saying in legal terminology. We also check to confirm that the parties

understand, reemphasizing that that is the goal, and give them the chance to ask questions that will help them understand.

Asking the lawyers to explain the principles and reasoning that underlie the law's potential application may help resonate with the parties' direct experience while reducing the law's potentially confusing and literal application. Once freed from the traditional legal lens, the parties can see the law for what it's supposed to be: society's effort to guide and regulate personal and business relationships from going awry, and to help put them back on track when they do.

Through all of the above, mediators must maintain bifocal vision, with one eye on content and one eye on the impact that the legal conversation is having on the parties. Is it helping or not? Is the law "party-size?" Are the parties confused, overwhelmed, or frustrated? Are they losing focus on what is important to them that may be embodied in other reference points than law? Are they surrendering their own perspectives and responsibility to the lawyers or to the law? We tell by watching the parties' reactions, listening to their concerns, and inquiring of the parties with the shared goal of increasing their understanding.

Or, in fact, is Conversation One doing precisely what it is intended to do? That is, enabling the parties to understand what would likely occur if their dispute were to be resolved in court, informing them of the values and principles embodied in the law, and supporting the parties' freedom and ability to give the legal perspective whatever significance it has for them.

