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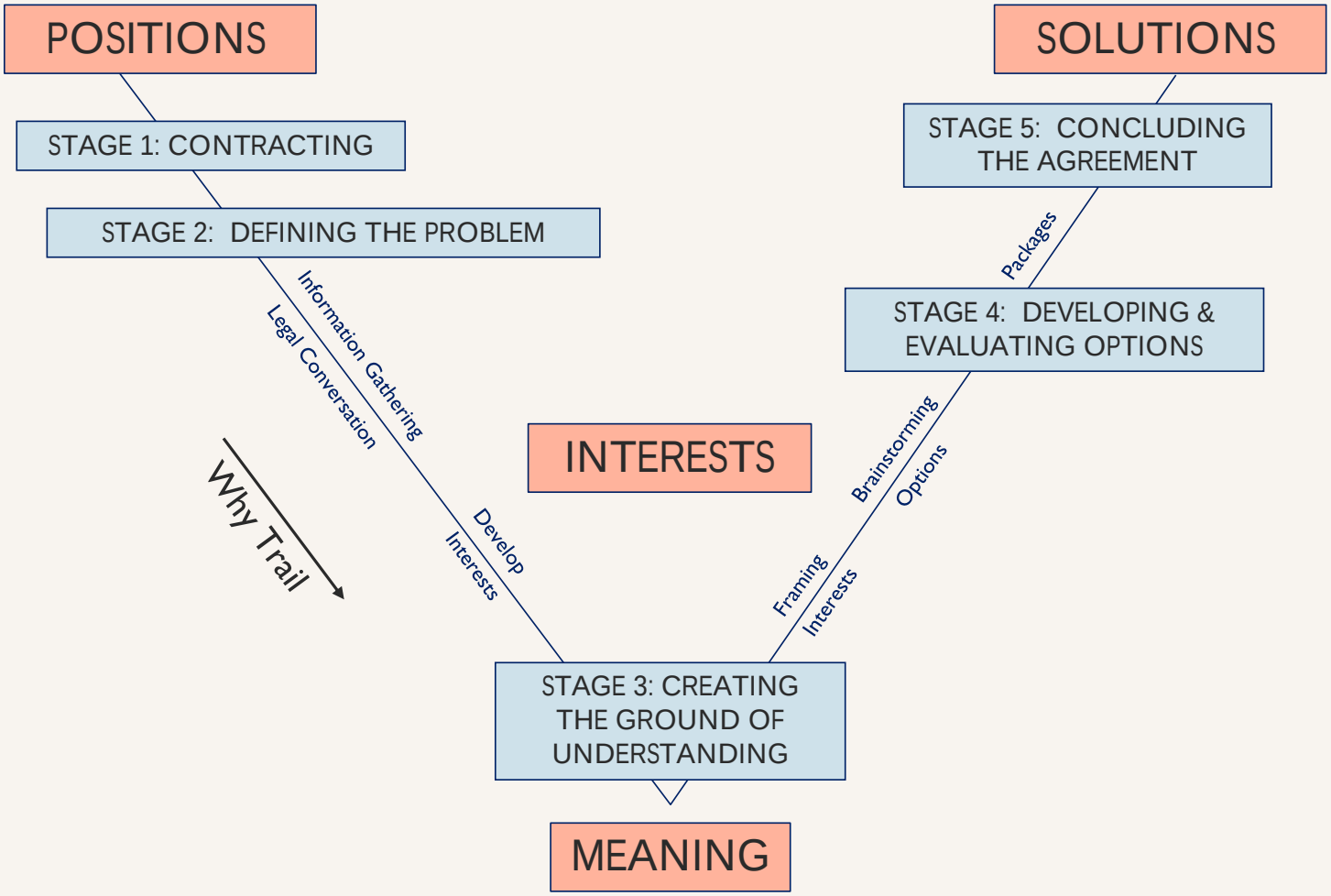
POSITIONS
SOLUTIONS
STAGE 1: CONTRACTING
STAGE 5: CONCLUDING THE AGREEMENT
STAGE 2: DEFINING THE PROBLEM
Packages
STAGE 4: DEVELOPING & EVALUATING OPTIONS
Information Gathering
Legal Conversation
INTERESTS
Brainstorming
Options
Why Trail
Develop Interests
Framing
Interests
STAGE 3: CREATING THE GROUND OF UNDERSTANDING
MEANING

HOW TO ELICIT INTERESTS

Help each party identify what is important, significant, meaningful, and beneficial --

1. Ask, Loop, Probe

2. Explore beneath positions

3. Empathize/ imagine/ suggest

4. Frame

HOW TO FRAME INTERESTS

1. **Significant to party**
   (has emotional resonance)

2. **Points toward multiple options**
   (not too specific)

3. **Tangible/graspable**
   (not too general)

4. **Described as present or future benefit**
   (rather than cost to other)

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It's All About the Money: Evaluating Options and Testing Them Against the Parties' Interests

A day before the first meeting in a scheduled mediation, I was surprised to find a memorandum in the mail from a lawyer whose name I didn't recognize. It made reference to a construction mediation I was about to start and was marked "private and confidential." Two days earlier, I had had a pre-mediation conference call with the two lawyers scheduled to come with their clients to see whether they could resolve a dispute in which a contractor was being sued by a homeowner for defects in his remodeling of a family home. Neither of them had referred to any other lawyer who would be participating in the mediation. This would not be the only surprise awaiting me.

The receipt of the confidential memo created a dilemma for me. Normally, I ask lawyers to prepare memoranda about the case to be submitted to me *and* exchanged with

each other prior to our meeting so that I have some familiarity with the case and their various views. The reason that I want them to exchange their memos with each other is that, as I explain to them, I want to work with everyone together, and in no event do I hold any information received from one side secret from the other.

So I called the lawyer who had sent the memo. He turned out to be representing the insurance company for the contractor. We had the following exchange.

> *Mediator:* I didn't know that you were part of the case, and I'm sorry that you weren't included in the phone call planning our session.
>
> *John:* I've been in lots of mediations before, so I didn't think I needed to be part of any phone call.
>
> *Mediator:* Well, you might find my approach to mediation somewhat different from your other mediation experiences. One thing that is different is that I don't want to be in possession of any information that I can't share with the other participants.
>
> *John:* Too bad. I sent you a confidential memo, and I expect you to keep it confidential.
>
> *Mediator:* Lucky for both of us, I stopped reading it as soon as I saw that it was marked "confidential." So, I think that leaves us with at least a couple of alternatives. I can send it back to you unread, and you can either send me a replacement that isn't confidential or, if you want me to read what you have sent, you can decide that it isn't confidential and send the others a copy of it.
>
> *John:* You know, it's kind of inflammatory, so I think it would be better if you sent it back to me. (He hesitated for a moment.) Nah. What the hell. It's all about money, and they might as well know how upset we are and that we are onto their game. I'll send them a copy.

■ ■ ■

Lawyers' Memoranda

The reason I want memoranda sent to me before a mediation in cases where lawyers are going to participate actively is to give me a sense of the situation, including their legal perspectives. Usually this necessitates a 5- to 10-page memo from each side, which allows

me to get enough of a feel of the situation that I can hit the ground running when we begin. It also makes the lawyers more comfortable to be able to provide the mediator with information about the case in their role as advocates for their clients. I learn a lot from these memos not only about the facts of the case and the law, but also about the attitudes of the lawyers toward seeking resolution.

Most lawyers don't show these memos to their clients before the mediation, although it would be a better practice, and I encourage but do not require them to do so. The primary reasons I don't insist on this are that I want to respect the lawyer-client relationship and I don't have the power to implement the suggestion. Nor do many lawyers show their clients the letter I usually send the lawyers in advance describing my approach to mediation and a suggested way of going about *working together*. I wish they did, but I don't assume they have.

Whether or not the parties are educated in advance about the process we are about to undertake, I find it important to have an in-person discussion at the start about how we will *work together*. With lawyers present, it is important for the parties and their lawyers to understand and reach agreements about their and their lawyers' participation that make sense to them. The lawyers' knowledge that I have already read their memos makes this easier. In this case, it was my turn to be surprised once again on the day the mediation began.

■ ■ ■

The mediation was set for 9 AM, but at about 8:30, participants began to arrive. I knew that Linda, the lawyer for the homeowner, Larry, was planning to be there with her client and that Connie, the lawyer for the contractor, Colby, also planned to be present with her client. And I assumed John, the lawyer for the insurance company, would show up. The people who arrived first, however, were experts who had been hired by each side to determine whether Colby had made errors in his work and if so, what it would cost to complete the job. All told, by the time the lawyers arrived with their clients, 20 people were jammed into my waiting room, with the overflow spilling out into the street.

I asked the lawyers and their clients to come into my office, which could comfortably accommodate about eight people, so we could

plan how to work together. When I asked them what they had in mind, John spoke.

John: I assume that you ought to meet first with our side, including our experts, and then with the other side.

Mediator: I have a different idea, which I talked about with Connie and Linda when we spoke by phone a few days ago. My goal would be to put all of your clients in a position to decide together what would be an acceptable settlement. To do that, I would prefer that we all meet together in the same room, so that they have the benefit of all of the expertise to get a full picture of their situation.

John: That seems crazy to me. How do you expect us to be able to openly negotiate with each other in the same room? Look, this case is only about money, and we have already been through one unsuccessful mediation process. I think that you're setting up a guaranteed failure.

Mediator: I'd like to think I'm not. It sounds to me as if you are concerned that at least when it comes to the negotiation part that neither side will feel that it can be open in each other's presence. That makes sense to me. I do think it will be challenging for the negotiation to be open enough to be successful. That would ultimately depend on whether you and your clients think it could be valuable to do it that way. It sounds like at the very least, this would be something that would be new to you. Could you imagine that it could be valuable for you and/or your clients to do this together?

John: You're the boss. If you think that we ought to do it this way, I'm willing to give it a try. I just am quite pessimistic that it could work.

Connie: I hate to interrupt this, but I think that this is not such a good use of our very expensive time. We have about 11 people here who are all being paid for their time. Linda and I just assumed they should be here, like in an arbitration. We should have told you, but they are here. And every hour is costing our clients thousands of dollars.

Mediator: I can appreciate that. What do you have in mind?

Connie: I think we need to put these experts to work to see whether they can make progress in narrowing their differences.

Mediator: So while we're in here working, we could have both sets of experts working together in another room.

Linda: That could work, but I think they might need your help.

Mediator: If this makes sense to all of you. I've never worked in quite this way before, but I would be willing to check in with them as we continue to meet here until the experts have reached a point where they can make a joint report to the rest of you and meanwhile come in here to help you make progress. If we go forward in this way, what could prove critical is for them to know from you that you jointly support their working together to narrow their differences.

Linda: That sounds right.

The lawyers and their clients agreed that was a good plan. So we crammed everyone into the room in which we had been meeting. I explained the plan, and the lawyers and clients gave it their support. The experts agreed to try to work together. I then met separately with them in the other room to set up some ground rules for their discussion. They said they would let me know if they needed me.

■ ■ ■

Using Experts

Generally speaking, if I start to work with parties prior to their hiring experts, I strongly recommend that they hire neutrals who will work with them to bring their expertise to bear as problem solvers where the only agenda is to provide as accurate an opinion as they are able based on the facts and their expertise, acknowledging the subjectivity of their opinions as well.

Working with experts who are hired as adversaries is very similar to working with adversary lawyers. Even though they are hired as "neutrals," the experts tend to align themselves with the side they "represent" either because of the nature of the adversary system or the nature of conflict. Each side's experts readily see the evidence and apply their professional focus from a one-sided perspective, and they easily become caught in an *expertise conflict trap*.

The challenge, as with adversary lawyers, is to help them get beyond defending the singular "rightness" of their opinions and look at the problem from a larger perspective that includes the strengths of their view and also takes into account their doubts.

Of course, this requires the support of their clients and their clients' lawyers. But it also represents a challenge for experts who have convinced themselves that the only way to see the problem is their way. Having them talk with each other outside the presence of the lawyers and their clients can reduce their polarization. They often know and respect each other and recognize that if they had been hired by the other side, their perspective on the problem might well have been that of their counterpart. I hoped that might happen in this case.

■ ■ ■

I returned to the room with the lawyers and clients.

> *Mediator:* I want to clarify something. I am not the boss here, but I do have some strong preferences. One of those preferences is to engage you as much as possible in designing this process with me. While I don't want to rule out entirely any possibility of meeting separately with each side, I find the possibility of a mutually beneficial solution greatly enhanced by our staying together, so I'd like to see how much progress we can make with all of us here. If we reach a point where you all agree that I should meet separately with both sides, I'm open to considering that as a possibility, but I would not anticipate that those separate meetings will be necessary and, in any event, would not want them to be confidential from the other side if we all agree to have them.
>
> *John:* Let's just move ahead.

For the next few hours, we did move ahead in both rooms. The experts reached a point where they had dramatically narrowed their differences about the cost of replacing a retaining wall that had failed from their starting figures of $15,000 to $75,000 to $30,000 to $45,000, and their difference about the cost of completion of the remodeling of the house from $5,000 to $75,000 to a range of $25,000 to $40,000.

In effect, the differences between the experts had gone from $60,000 to $15,000 regarding the wall and from $70,000 to $15,000 regarding the remodeling of the house. That meant the gap between the estimates for completing the work that had been as much as

$130,000 was now narrowed to $30,000. Everyone recognized the significance of that movement. The divergence in the experts' opinions would likely not prove an insurmountable obstacle to resolution.

Clarifying Differences

In meeting together with the parties and their lawyers in the other room, we proceeded with *conversation one* about the law. The lawyers had a significant disagreement about how to interpret a clause in the original contract that called for the completion of the house by a particular date and whether the initial contract had in fact been amended by a writing signed by both parties a few weeks before the initial contract was to expire. Although none of the lawyers gave up on their legal positions, neither did they claim that their positions were without risk. As a result, the differences between them were slightly narrowed when we emerged from the conversation about the law, and both clients recognized that there was not a single view that would clearly prevail if the case were to go to trial.

We then proceeded to *conversation two* and heard from each of the parties about how their dispute had developed. Larry described a relationship with Colby that began with great optimism and a shared vision of a significant remodeling of his house while he and his pregnant wife and their three-year-old child were living there with a definite schedule and agreed-upon price. As the remodeling progressed, the workers fell behind schedule and changes were made that resulted in increased costs. Close to the due date on the contract, Larry prepared a new agreement that called for both the termination of Colby working further on the project and what he understood to be a financial penalty to be suffered by Colby in the event that the house was not completed within the new time frame.

Larry's version of the events that followed accused Colby of inadequate workmanship, construction of a faulty retaining wall, and a failure to meet the new deadline. He was clearly frustrated by the situation, blaming Colby for the fact that now, one year later, work on the house was still incomplete because of the litigation. He had relied on Colby's expertise in constructing the retaining wall, and it had failed, resulting in potentially serious undermining of the house's foundation.

Colby's version differed in his feeling that Larry and his wife continually changed the plan, resulting in the delays and increased costs. He described signing the new agreement as a supplement to, not a replacement of, the original, and he never understood that there would be any financial penalty for failing to meet the deadline. In any event, he was shocked when he did not receive the agreed-upon amounts for various stages of completion of the work, and he was forced to file a lien on the house to secure the unpaid portions of his work. Colby felt that he had been taken advantage of and that he was underappreciated. The decisions regarding the retaining wall had been made by Larry in a cost-cutting mode. He felt that the "failure" of the wall had been greatly exaggerated and that it was never meant to protect the foundation, which he believed was never at risk.

■ ■ ■

Helping the Parties Broaden Their Views

Colby and Larry had both taken self-protective stances, each blaming the other for the creation of the problem, a natural reaction of each side to accusation from the other, until they had become solidly ensnared in their *conflict trap*. From my vantage point as mediator, I could see that they had each made assumptions about the other's intentions in terms of how it affected them while judging their own actions in what they viewed as their own justifiable and honorable intentions. In this manner, they each cast the other in a negative light, while justifying their own actions as necessary protection. I knew that if I could help them see this pattern, it might reduce some of the acrimony and harshness that had characterized their relationship and help them each see beyond their own views of the problem.

■ ■ ■

As I worked further with Colby and Larry to help them to clarify their own views and seek to understand each other's, Colby acknowledged how frustrating it must have been for Larry to deal with the delays and cost overruns and how from Larry's perspective, Colby had not communicated clearly enough for Larry not to be surprised. Larry could understand how Colby had worked hard and done the best

that he could under the circumstances and how Colby felt entitled to be compensated for the value of his work.

We then focused on charting the interests of both sides:

Colby	Larry
Fair compensation for efforts	Finishing work at a reasonable cost
Fair allocation of responsibility for consequences of changes	Safety for family
Reputation for reliability	Protection of investment

I had the sense that there were more interests on both sides, but that they might come up later as we worked toward possible solutions.

Evaluating Options

We then explored a variety of options for completing the house and managing the risks associated with that, without evaluating the options.

- Colby finishing work on the house
- Hiring someone else to finish work on the house
- Selling the house in its present state
- Leaving the house in its present state
- Colby remitting cash payment to Larry
- Colby receiving compensation
- Basing the compensation on the actual cost of finishing the house after the fact

When we evaluated these options against the interests, it became clear that the preferred option for all was to agree on a monetary resolution of the cost of completing the remodeling, dealing with the retaining wall and compensating Colby for work done. At this point John again raised the question of caucusing.

> *John:* I do feel that up to this point it's been helpful for us all to be together, but if we're going to make progress now, we ought to be meeting with you separately. I'm here to represent the insurance company, which, as I have explained, doesn't seem to have much responsibility here. So our interests are different than Colby's. We are not going to talk about that openly here.

Mediator: John, you seem to feel that meeting separately makes sense now, at least partly because the interests of the insurance company are different than those of your insured, Colby. Perhaps it would be helpful if each side met on its own, without me, to consider possible proposals or whatever else you might wish.

They agreed. Colby, Connie and John then met together for about 20 minutes. At the same time, the other side was meeting together to think about how they would be proceeding.

■ ■ ■

Putting Out Proposals

Proposals can be put together in a variety of ways. Normally, I prefer to have each side prepare proposals in writing, ideally more than one, for each side to keep the process fluid.

■ ■ ■

When we came back together in the room, John began.

John: We have a proposal. We are concerned about a couple of things if we put it out. First, if the other side doesn't like it, they might just walk out and end the mediation, and second, they might jack up their numbers just to respond to our offer.

Mediator: It sounds to me like you have developed a proposal that you think makes sense for your side, but you are concerned that it might be considered inflammatory to the other or that they might see it as an opening offer and respond strategically. Is that right?

John: Yes. We have thought this through and given where we are now, we think this is a good place to start.

Mediator: A testing-the-waters kind of solution. But you would like the commitment of the other side to continue the conversation, no matter what they think of the offer.

John: Right.

Mediator: Linda and Larry, what do you think about this?

Linda: We'll agree to stay in the room, but I have to tell you, if this is a lowball offer, which it sounds like, we are not about to respond with reasonableness.

> *Mediator:* So you are also concerned about not placing yourselves at a disadvantage through some kind of strategic bargaining. What's good about this is that you both sound like you want to move forward in a serious manner, and there is naturally some tension about how to get the ball rolling in a way that neither of you feel disadvantaged in the negotiation.

■ ■ ■

Dealing with Numbers

Once we reach the point of putting numbers on the table in a joint session, sophisticated negotiators are naturally reluctant to start the bargaining close to the point where they believe that the case should settle. The tendency of each party is to put out a number that gives them a lot of room to move, because they anticipate that the other side will be doing the same. So the different sides are often feeling out one another, as each announces their opening offer to see the reaction of the other. Thus ensues a time-honored classic way of bargaining where each side moves slowly toward the other from their extreme starting positions. It is a challenge to find a way to cut through this usual dance when all of the parties are in the same room.

A mediator can help in a variety of ways. The first is to simply identify this typical way of bargaining and see if the parties are willing to deviate from it. Of course, this doesn't make the problem go away, especially if you have sophisticated negotiators in the room, but it helps to have some discussion and even agreement about the *how* of this part of the process before we get into the *what*.

The mediator can help the parties act in a less strategic way by working to ensure some *mutuality of vulnerability*. In the dance of strategic extremes, one way to reduce the tendency of the parties to react strategically to each other's offers is for the different sides to write down their offers and pass them to the mediator simultaneously so that he or she can review them before providing them to the other side. If the mediator feels that only one of the parties is operating strategically, there is the option of not passing them on.

Most critical is using the relationship between the interests of the parties and their numbers. Here the idea is to recognize the relationship between the parties' solutions and their interests and

to use the interests to ground the solution. The point is that any mutually acceptable solution has to meet the interests of both sides. The goal then would be for the parties to be able to explain how any number meets both their own interests *and* the other side's as well. That would prove my main effort in this case.

■ ■ ■

Mediator: My goal is that both of you feel there is a mutuality here in our moving forward. For that to happen, it would be helpful if you each come up with proposals that have reasoning behind them that you think should be appealing to the other. The reasoning will then give us a better understanding of where you might differ and agree. And to minimize the part of this where you could be reacting to each other or feeling that the focus is just on one side, you might want to prepare the proposals in writing and pass them to each other through me.

John: No. Let's just put this offer on the table and go from there.

Linda: That's all right with me.

Mediator: Okay, if we get stuck we can always take up my idea later, if it makes more sense to you to proceed in this way.

John: Well, we've looked at this carefully from the insurance company's point of view as well as Colby's. And for this purpose, the company would be willing to pay $30,000, which we think would be close to the company's exposure in this case for the water damage to the retaining wall, and that Colby should be paid the remaining $25,000 he is owed for unpaid work. These numbers are scaled down from what Colby is really owed, and the wall damage represents something that is close to the high end of what the company would have to pay if we lose in court.

Linda: I'm sorry now that I promised that we wouldn't walk out of here when we heard their offer. I can't believe what I'm hearing. This represents a net offer of $5,000. You've got to be kidding. This is probably worse than if we went to court and lost everything.

Mediator: So you're disappointed. I'd like to see if we can go through the reasoning behind it to see where the divergence

might be. Rather than bargain over numbers, let us see what the numbers rest on for both sides. Is this okay?

John: Sure.

Linda: I'd like to respond. First of all, even if we use their numbers for the cost of the retaining wall and the completion of the house, that is $55,000 right there. So offering $30,000 is even lower than where their expert's numbers would put them. There is no dispute that the retaining wall failed, and there is no dispute that the remodel is incomplete. And as for paying Colby, we have an agreement signed by him that if he failed to complete the house in time, he would not be paid anything further.

Mediator: So this is your reasoning for why the offer is inadequate. Would you like to hear from John what his thinking is about the offer?

Linda: Not really.

John: Why don't you make an offer then?

Mediator: That could be the next step, but I would find it helpful at least for me to understand what's behind your offer. Is that okay with you, Linda?

Linda: Go ahead if you want, but frankly I'd rather make our offer first.

Mediator: All right, but I do want to come back to the reasoning on both. That's the best prospect for having a basis for moving forward.

Linda: We'd settle for $125,000 from the insurance company, and no further payment to Colby.

John: This is exactly what I expected from you. This is completely off the wall, beyond your wildest dreams of what could happen in court.

■ ■ ■

Once again, what seemed most likely to help with this kind of positional bargaining that they had assumed would be to turn the attention from the *what* to the *how* and see whether we could find a more constructive way to proceed that would get us out of the strategic trap.

■ ■ ■

Mediator: So far, you've each managed to unsettle the other with your offers.

John: We need your help here. This is where I would expect you to meet separately with us to move us closer.

Linda: I don't want to do that. I'm still here and I'd like to see if we can do this all together.

John (to me)*:* Then how do you think we can proceed?

Mediator: Well, it's clear to me that we need to have more discussion about what would happen in court since you seem to have such different perceptions about that. We also need to go back to what the priorities are for each side and look at these offers in those terms. And I think we need to create some understanding about how to present another round of offers that will feel less polarizing to both sides.

John: All right. But I have to tell you, I'm worried that if we put out another offer that is close to the best we can do, we could find ourselves in a position we don't want to be in.

Mediator: Which would be?

John: We've put out a good-faith offer, and they just sit there.

Mediator: So you would like this next round to feel as if there is more mutuality.

John: Yes.

Mediator: And you, Linda?

Linda: Yes, but they are going to have to get realistic.

Mediator: If this next round is going to move us forward, it would be helpful for each of you to put it together in a form that you think should be appealing to the other side and be prepared to explain why. Otherwise, it just continues the number trading and taking potshots at each other. In order for that to work, it would be helpful to establish that you understand each other's priorities as well as your own. So it makes sense for us to review those priorities.

■ ■ ■

Testing Numbers Against Interests

Because we had identified the parties' interests at an earlier stage, we could use that as a basis for the particular options that

we had been discussing, particularly with respect to focusing the parties on how they believed their solutions met the interests of both sides. As the mediation progresses, a dynamic relationship between the level of options and interests can be used to clarify interests or even identify new ones as well as create new solutions that are responsive to those interests.

■ ■ ■

Linda: Larry has made it clear that his primary objective is to finish the house at an affordable cost.

Mediator: That's true. He also said that he wanted to be sure that the house was safe for the kids and would not require a lot of maintenance in the future. Was there anything else, Larry?

Larry: I said this before, and I meant it. I am not out to rip off anybody. If Colby had completed the house on time and properly, we wouldn't be here. I never meant to punish Colby.

Mediator: So one of your goals in addition for you and your family to have the house you wanted is for Colby to be fairly compensated. Is that right?

Larry: I have never said otherwise.

Mediator: That's helpful. Let me add that to the list. And how about Colby and the insurance company?

Colby: All I want to say is that I have retired as a contractor now, and I feel that I put myself out to do everything I could to give Larry and his family the best I could do, but they kept changing their ideas.

Mediator: One of your priorities is to have a result that fairly allocates responsibility for those changes.

Colby: That's right. And they need to take responsibility for making choices based on their budgetary concerns that have created the retaining wall problem. I told them I would build whatever they wanted, and Larry said he wanted to cut costs.

Mediator: So you want recognition of responsibility for decisions that were made as well as constraints on the budget that were not of your choosing?

Colby: That keeps getting left out of the mix.

Mediator: Is anything else important to you that we haven't identified here?

Colby: Yes. One of my greatest disappointments in all of this is that I felt I bent over backwards trying to make this work for Larry and his family. A number of things were beyond our control, but whatever we could do, we did. We worked overtime without charging for it. I took people off other jobs to try to keep to our schedule.

Mediator: What you would like is some recognition of the effort you made to do this job well and efficiently.

Colby: That's right. Very few contractors would have been willing to work under the same conditions.

Mediator: Then why were you willing to do that?

Colby: I felt like we were helping a family in a difficult situation.

Mediator: So this had a personal dimension for you in terms of your relationship to Larry and his family. Now with this in mind, I think if each side could prepare offers that you think respond to what has been identified clearly by each of you as your priorities here, this could give us the impetus for the next round. What we haven't identified is whether anything from the insurance company's perspective needs to be thrown into the mix.

John: We wouldn't be here if we didn't want to help solve this problem, but Linda, you're going to have to be realistic if we are going to get anywhere.

Mediator: Settling this case on a basis that you can justify to your carrier is why you're here.

John: And that means that you need to recognize that our coverage would be limited only to any problem with the retaining wall. Our exposure is really quite limited.

Mediator: So you're emphasizing that your coverage relates solely to the retaining wall. And the other economic factor, I assume, would be the cost of defense.

John: That's right. Paying the experts plus our legal fees is also of concern to the company. But we don't settle cases on that basis. Otherwise we'd be in a position to compromise cases that have no merit.

With new interests identified through testing of the options against the interests, we add those interests to the chart so that we can all see the relationship between the options and the interests.

■ ■ ■

Testing Against the Legal Reality

No matter how fully we focus on the parties' interests in helping them negotiate a resolution, at some point it is almost always necessary to refer again to the legal reality. Doing so helps to test any particular solution, since the ultimate goal is to help the parties reach a result that is better for both of them than their alternative. While we have already had *conversation one* about the legal reality at an earlier stage in the mediation, it is often necessary to have another version of it at this final stage, particularly because both sides are comparing the likely result in court with the resolution being considered in the mediation. Part of that legal reality includes the transaction costs, which can be a significant element of that determination, whether made explicit or not.

■ ■ ■

> ***Linda:*** I suggest we exchange offers through you and then be prepared to talk about them.
>
> ***John:*** I'm willing to try it, but again I don't think we will be able to have the frank discussion that might be necessary to settle this case without meeting alone with you. But we'll do it. We will meet again with Colby and come up with a joint proposal for the defense.
>
> ***Mediator:*** You've registered skepticism, and what I can tell you is that if you can share control of this process with each other and want to settle the case, you will.

Each side met separately and within 15 minutes came back together and submitted numbers to me which I then passed on to the other sides. Linda's offer was $95,000 reduced by a payment to Colby of $20,000. John's was a $55,000 payment to Larry, of which $30,000 would be paid from Larry to Colby. The net cost of Linda's offer was $75,000 and the net offer from John $25,000. They were $50,000 apart.

> ***Mediator:*** Now I think it would be helpful to understand what the reasoning is behind these numbers and particularly how you think your numbers take into account the interests that we identified on both sides.

■ ■ ■

Looking at the Problem Together

This is where *working together* provides a real opportunity. If the parties have both clarified and expressed their own interests and made efforts to understand each other's as well, when we undertake this task with everyone in the room together, we are all looking at the whole picture. Each person's problem is everyone's problem. Since no agreement will occur if we don't find an option that meets the interests of each party, we can engage the parties in a conversation to examine the options in light of the interests of both sides. This makes for a very different dynamic than each party looking only at their own interests. In this way, the parties are also encouraged to look at the problem from the perspective of the mediator.

■ ■ ■

John: The $55,000 number is a very generous offer. I think it is close to the maximum of the company's exposure if we lose the case. It gives Larry the ability to finish the house.

Linda: It doesn't come close to that. Your own expert recognized that it was going to cost a lot more than that to deal with future water damage on the wall, and this doesn't begin to take into account all of the unfinished parts of the house that make it uninhabitable. On page four of the expert's report, he admits this.

John (to Mediator)*:* This is exactly what I was afraid of. We've made a legitimate offer, and she's just trying to poke holes in it. I'm withdrawing this offer.

Mediator: So John, you see your offer as going a significant distance in meeting Larry's interest in finishing the house while also being realistic in terms of the legal alternative, while Linda, you feel the gap between the offer and that reality is too great. And you both seem frustrated with each other's response. Of course, you're free to withdraw any offers you make at any time. But before you react to each other's offers, I'd like to understand why you each came to the conclusions that you did and, more particularly, how you think your offer meets the other's side's interests as well as your own.

Linda: We're really far apart. I don't think we're going to be able to settle this.

Mediator: I don't know whether we will or not. But if we are, I think it could come from each of your better understanding how the other's offer is responsive to your priorities.

Linda: I'm listening.

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Connecting the Numbers with the Interests

Although the parties remained focused on the numbers, it was important to keep the connection alive between the numbers and the interests rather than get caught in an argument about the numbers alone. Asking the parties to explain to each other how they think their offer meets the other's interests helps maintain that connection.

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John: We think that the $55,000 will go a long way toward Larry completing the house. Because Larry changed the design of the house so much, it shouldn't be our responsibility to provide a completion that wasn't contracted for. We also think that there are cheaper ways of fixing the wall that will be safe for the kids and the structure. This is better than the wall that Larry originally had in mind. Colby's compensation is dramatically reduced here, and we think this takes into account more than his share of responsibility for where things stand.

Mediator: Linda, do you and Larry understand what the reasoning is behind their offer and why they think it meets Larry's interests?

Linda: I think so. I just disagree with it.

Mediator: Then let's hear from you about how you believe your offer meets Colby and John's priorities.

Linda: Well, first we are willing to pay Colby $20,000, basically out of the goodness of our hearts, because we are not legally obligated to pay him anything. The contract was clear that if he didn't meet the deadline, no further payments would be made. This is an important gesture here, and a significant movement on our part. We have also reduced our demand to $95,000, recognizing that there is at least some ambiguity about whether changes were made by Larry. Our view is that those changes were necessitated by the structural problems that were Colby's

responsibility, but we recognize that as the project developed, Larry and his wife made some decisions that had some impact on the scope of the job.

Colby: I am not, and never represented myself to be, a structural engineer, nor was there any need for an engineered wall.

Linda: Our experts say otherwise, and even your expert recognizes a potential danger from leakage.

Mediator: Colby, you still disagree about the degree of responsibility you should assume for the wall, but I also hope you recognize the effort that Larry and Linda have made here to offer compensation and assume some responsibility for changes made to the project.

Colby: I do, but I just wanted to point out this problem that keeps coming up.

John: What do we do now, Mr. Mediator?

Mediator: First, I think we need to recognize that there has been considerable movement on the part of both sides, so that there is now only a $10,000 difference in compensating Colby, and there is a $40,000 difference on payment from the insurance company to Larry. My suggestion would be that each side come back with another offer in an effort to close, or at least narrow, the gap.

John: I do think it would be helpful if you met separately now with each side or if you gave your opinion as to where the case should settle.

■ ■ ■

Mediator Opinion

It is often quite tempting for the mediator to fasten on a number that could or should settle the case, and, of course, even in our model, this would not be the end of the world. The dangers, however, remain. Relying on the mediator to determine the outcome gives the mediation the potential to become much like an arbitration. Having worked so hard to reach this point, now the parties might readily cede their power to the neutral as a way to relinquish responsibility for finding their own meeting ground. The other danger is that one or both of the parties will be alienated by the mediator's number, jeopardizing the relationship of neutrality.

The value of the mediator's suggestion of a number is that it is an outside opinion by someone who has no agenda other than to settle the case, and that having a number come from the mediator rather than themselves can help the parties feel less vulnerable. While on occasion, we are willing to point out a number where experience suggests a case might settle, we are quite reluctant to do so. On a fundamental level, we feel strongly that this is the prerogative of the parties, which for us is the whole point of mediation.

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Mediator: You have expressed wanting me to meet separately with each side and to suggest a number where I think you ought to settle. I think you are making a lot of progress without my having to do that. Obviously, we could take an approach to try to split the difference, but I think it might be useful to have some more discussion about the cost of the wall and the degree of protection needed to guard against future problems. It also might be helpful to talk some more about the two different prongs of the agreement, to better understand how we might go about closing the gaps.

Connie: I've been quiet up to now, but it needs to be said that the only thing that matters to Colby is getting paid for his work. The company doesn't really care a lot about that.

John: And I have to say that we are getting pretty close to the limit of what the company can pay Larry. Personally, I'd like to see Colby get paid, but the company doesn't benefit from that at all.

Linda: Larry needs to be able to finish his house, so any money that he pays Colby cuts into his ability to do that.

Mediator: I find this conversation to be quite helpful. We still have some tension in trying to come to the right figure for everyone, but I find this to be a good tension that recognizes the different realities. Are we ready to do another round of offers or is there anything else that any of you would like to say before we do that?

■ ■ ■

Accepting Tension

One of the greatest challenges for the mediators and the parties at the end of the mediation is to be able to live with the tension that accompanies the final stage of the mediation. We can all sense the possibility of an agreement, but the differences remain, and we don't want either party or ourselves as mediators to fall into the trap of making an agreement just to relieve the tension of the parties' differences. As the mediator, I have learned to recognize that this tension is good for the mediation. If I am feeling it, it means I am exactly in the place the parties have hired me to be in. It is also important for the parties to be able to live with the tension than either to pretend that it doesn't exist or, more dangerously, to give in to make the tension go away.

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> *Linda:* I'd like to ask Connie and John a question. Would your expert actually fix the wall for the amount that he is saying the repair would cost?

This turned out to be crucial toward narrowing the gap. Connie and John left the room to ask the expert whether he would fix the wall for the amount he estimated. A few minutes later they returned.

■ ■ ■

Testing the Options Against Reality

Once we start to focus on a particular solution, we not only need to test the options against the interests, but to test the options against reality, often requires outside information. Whatever the interests have been, it is critical that the parties not make a commitment to an agreement that won't work. If the parties are reluctant to do this because they are afraid that there might be a problem, it is up to the mediator to press the point to ensure that the progress is not an illusion.

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> *Connie:* Our expert is willing to make his estimate a bid and be bound by it.

Linda and Larry then left the room to confer and came back a few minutes later.

> ***Linda:*** We're willing to reduce our $95,000 demand to $70,000, and we'll stay with our last offer to Colby of $20,000.
>
> ***Mediator:*** Why?
>
> ***Linda:*** Since our costs will be reduced, we think we can make this work for Larry to finish the house.

Connie and John then conferred with Colby, and a few minutes later they returned.

> ***Connie:*** We'll pay the $70,000, but we need Colby to receive no less than the $30,000 we talked about before.

Linda and Larry conferred again, and within a couple of minutes, they returned and accepted the last offer. We were done and a sense of relief permeated the room. The deal felt good to me. Larry would be able to complete his house, and Colby would have enough to begin his new life. Larry and Colby shook hands with each other and wished each other luck. The moment felt genuine.

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I would like to think this process worked better for these parties than the usual settlement process in which the neutral would have met separately with the parties and put pressure on them to settle. What had worked was that the result wasn't simply an agreement about money. The money was a basis everyone understood. One side had been able to take advantage of the other side's expertise to accomplish the result of completion of the house. The insurance representative had a sense of what was meaningful to Larry and his family, and that may have been a motivating factor in settling. So it wasn't just the net result that mattered. It was the particular configuration of the two amounts and what that could accomplish for the parties that had ultimately directed us to the particular solution we reached.

As we left the room, John pulled me aside.

> ***John:*** You haven't made me a believer, but I must admit I'm a little less skeptical about this idea of staying together. There aren't many cases it could work for, because most of the cases I handle are just about the money.

Mediator: I thought you felt that way about this case in the beginning.

John: I guess I did. I'll have to think about that some more. But I've got to run to another case, and let me assure you—that one's really all about the money.

■ ■ ■

I was glad that we hadn't caucused because I think that kept the reality of the people's lives in the forefront. While it clearly had been uncomfortable for everyone, including me, to stay in the same room together, I think it was more efficient than if I had shuttled back and forth, leaving half of the participants in one room wondering about what was happening. We had been able to take advantage of everyone's expertise, we all had an understanding of what was important to the parties, and there was a sense of *working together*—all of which I'm convinced made a difference in the end.

Commentary: Evaluating Options and Reaching Closure

Once the parties brainstorm options, they have three central steps for evaluating them: prioritize, assess against interests, and needs, and negotiate outcome.

1. Prioritize—Each party designates the most and the least workable options.
2. Assess Against Needs and Interests—Each party assesses all promising options in terms of how they meet *all* parties' needs and interests.
3. Negotiate Outcome—Parties refine, test, and choose options.

Prioritize

Once we have a list of all of the possibilities, the next task is to determine which ones can work best for all parties. With all the options listed on flip charts (or another display equally accessible

to everyone participating), we begin the evaluation process by having each party separately rate each of the options. The point is to see which options the parties have an interest in exploring further and which they do not. While there is no one set way to do this, we often have the parties record their ratings for each option—A, B, or C—with A signaling interest in exploring further, C indicating no interest, and B somewhere in between.

Then each party gives the results to the mediator who records the ratings on the flip chart that has been used to identify the options. The parties can then see how interested they both are in each of the options. This not only saves a lot of time going through a discussion of every option, whether of interest to the parties or not, but provides the parties with a lot of information about each other's preferences and, by giving the priorities first to the mediator, it reduces strategic maneuvering.

Assess Against Needs and Interests

Once the options have been rated, then it is time to test them against the interests both parties have identified. (We usually start with the double As, if there are any, or A-Bs.) To this end, we refer to the chart on which we earlier recorded the parties' interests and options. Then the mediator works with the parties to test the options the parties have chosen to explore further.

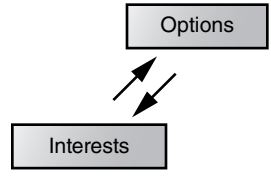

FIGURE 12.1

Going back and forth testing how the options are grounded in the parties interests is often an iterative process. By looking again at the interests from the perspective of the options, parties may realize that they have interests that they had not previously articulated. And, similarly, new options might also emerge.

By this point in the mediation, we would hope to ask each side to talk about how the particular option might or might not meet the interests listed for *both parties*, particularly if there has

been real understanding between the parties. When the parties are able to do this, not only the mediator but they too are looking at the whole problem. We call this perspective "mediator consciousness." As with Larry and Colby, the parties' *working together* in this way can prove crucial to their ability to reach closure in a manner that truly resolves their differences.

Bringing the interests to the foreground can seem like a step backward. Not at all. The whole point is that the options be solidly grounded in the interests. Testing the options against the interests naturally makes for a fuller view of the whole problem and its resolution. When the options stand solidly on the foundation of the interests, the endgame can be more a mutual searching for common ground rather than simply bargaining and trade-offs.

With Larry and Colby, testing the options against the interests meant translating the numbers into the completion of the house, and Colby also affirmed that he too wished Larry to have the house he wanted for his family. For Colby, it meant the economics of his contracting business were important for them both to see as they moved toward closure. Larry recognized that and also affirmed that he wanted Colby to be fairly compensated.

By testing the options against the interests, we have narrowed the possibilities and refined the ideas sufficiently to require further exploration to test them against reality, and set the stage for negotiation.

Negotiate Outcome

Now that the parties are ready to negotiate, the tension that often eases during the creation phase comes back into the room. As mediators, we worry if this does *not* occur. However big we made the "pie" during the creation phase, both parties realize that they must now make concrete decisions about dividing it up.

To work most effectively with the endgame, the mediator does well to maintain bifocal vision—on both the *what* and the *how*.

Working With the *How*

The last part of the mediation, where the parties negotiate the final result, is often fraught with tension, particularly when the

parties recognize that however creative they have been in developing options, they must still make decisions to divide what is before them. If the tension between the parties has been eased during the creation and evaluation of options, it can be surprising, even jolting, to the parties and the mediator to feel the tension creep back in the room.

As mediators, we experience the discomfort of this tension, and taking action to make it disappear could easily undo all of the good work that has gotten us to this place. Here we return to one of our guiding concepts—*allow tension*. The mediator can work to allow the discomfort of this tension within and between the parties and the mediator.

As mediators we face several dangers at this phase:

1. Trying to impose our own solution;
2. Allowing one party to coerce or manipulate the other;
3. Trying to speed up the process by pushing the parties to make decisions before they are ready;
4. "Laying back" too much and allowing the negotiation to turn into an exchange of numbers that disconnects the parties from what is important to them;
5. Losing our neutrality and favoring one party at the expense of the other.

Here we need to face a central internal challenge as mediators—not to measure the success of the mediation or our success as a mediator by whether the parties reach an agreement. This is particularly difficult when much of the outside world wants to use such an external test of competence. There are several problems with using such a test that can jeopardize the success of the mediation.

Our view is that whether the parties reach an agreement is not necessarily a statement about the quality of the mediation. For us, success is not achieved when agreements are not solid or were not the product of joint decision making. Many cases mediators can feel good about are those where the parties did not reach an agreement, but where some authentic exchange occurred that represented an important movement between the parties. And for the parties, reaching an agreement is not the only important

factor. It is *how* they reached it, if they did, that sticks with them, and what went on between them, if they did not.

So what does this all mean about *how* to work with the parties in this phase? Remember the principle: *let the parties own their conflict*. It truly is up to the parties to find their own solution and accept the *primary responsibility* for that. Once liberated from the self-imposed pressure that as professionals we carry the burden of whether the parties reach an agreement, we can actually feel freer to help them.

Second, we are monitoring the process to observe and, if necessary, comment on the communication between the parties. Are they both making the effort to speak up for themselves and take each other into account? Do they both understand their situation—where they are and what they are trying to achieve?

With lawyers in the room, who is doing the negotiating? Are the lawyers encouraging the parties to speak for themselves or are they taking over? Are the parties feeling supported by their lawyers?

We also try to ensure that as much as possible the process feels fair to the parties. To that end, we can help the parties move forward by creating mutuality of vulnerability between the parties—where one party is not left feeling overexposed in relation to the other.

Working with the *What*

A variety of techniques can be used to keep the playing field level and create forward movement during the endgame, particularly when the mediation seems as if it may be stuck. We will suggest a few of them here, not to try to catalog them but to illustrate how mediators working with both parties in the room at the same time can productively use the tension present and help deal with the age-old negotiation problem of who goes first, and without coercing the parties.

Maintaining the Connection between Solutions and Interests

In order to keep the mediation from turning into simply a numbers game, it is important to continually look for the essential relation-

ship between solutions and interests, as this case illustrates. Even when the parties are close to a solution, tracking their movements in relationship to their own and each other's interests helps keep that connection alive and can open doors that might otherwise seem closed, as it did for Colby and Larry.

Simultaneous Offers

Sometimes the parties have reached a point where there is a significant disparity between their last offers. Perhaps, as in this case, the lawyers are used to caucusing and don't want their clients to make a move unless they are sure it will be reciprocated. One way to deal with that is to ask for simultaneous offers. After explaining the goal of trying to avoid the strategic trap, we may suggest, as in this case, that (1) each party write down a number that they will be prepared to explain works for the other side as well as for them and (2) then give those numbers to the mediator to see if they pass a threshold test of whether they have each taken the task seriously before (3) the mediator passes on the offers to each side as the basis for (4) a dialogue in which each party explains why they believe the offer works for both sides.

Exploring the Advantages and Disadvantages of the Last Offers

Here, without either party having to signal any movement, we ask each side to consider what it might mean for them to accept the other side's last offer and what it might mean if the other side accepted their last offer. This often provides more understanding in the room that can be the basis for some real movement.

Exploring the Law Again

As the mediation moves toward the point where parties recognize they may actually end up in court, having another conversation about the law (*conversation one)*, examining the risks and probabilities of a court judgment, particularly in relation to the last offers of both sides, can help parties reassess where they are. This also might entail looking more closely at the practical consequences of going to court, including the impact on the relationship between the parties and the time and money that would be spent.

Accepting Closure

For some participants, coming to the end of the mediation makes real the fact that a chapter in their lives has come to a close. A mix of sadness, relief, joy, and pain may accompany that recognition. In these moments, particularly when it is not clear an agreement will be reached, the parties need to decide whether they are willing to *work together* toward a decision that allows them to let go of the conflict.

For Colby and Larry, this meant coming to terms with cutting their losses and allowing each other to move on. Whatever was bound up in the difficulties of the past, it was now time to decide whether they were willing to try to understand each other's perspectives. Both were. Sometimes, as here, it can prove essential to face the underlying emotional reality of the situation, including returning to their reasons for mediating in order to bring closure to the conflict. In this case, it included the money, *and* so much more that the money represented for each.