

[Vol. 12: 97, 2012]

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# The Five-Tool Mediator: Game Theory, Baseball Practices, and Southpaw Scouting

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## I. INTRODUCTION

Not everyone can share the fortunes of the departed mega-negotiator Richard Holbrooke.<sup>1</sup> Most of us never will possess the Ambassador's size, genius, charisma, boundless energy, and relentlessness.<sup>2</sup> Genetics, not conditioning, determine most of such traits.<sup>3</sup> For the remainder, the crucible of childhood and adolescence, wildly beyond the control of youth, will

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1. Holbrooke, former United Nations Ambassador (1999-2001), was America's special representative to Afghanistan and Pakistan in the Obama State Department from January, 2009 until his death in December, 2010 and was described by President George H.W. Bush as "the most persistent advocate I've ever run into." Roger Cohen, Op-Ed., *The Mother of Friendships Lost*, N.Y. TIMES, July 10, 2008, <http://www.nytimes.com/2008/07/10/opinion/10cohen.html>. His greatest achievement in consensus building was brokering the 1995 Dayton Peace Accords that resolved the political and humanitarian crisis in Bosnia. *Id.* Holbrooke expressed his belief in the power of negotiations to bring peace and prosperity in a politically disintegrating world by way of an "improvisation on a theme" style of diplomacy. *Id.* International diplomacy is a special category of multiparty negotiations; Holbrooke's would not have succeeded at Dayton had the United States armed forces not been active in destabilizing the confidence of Slobodan Milosevic in his control of his land base. See Robert A. Pape, *The True Worth of Air Power*, FOREIGN AFF., Mar.-Apr. 2004, at 122-23.

2. Holbrooke's 6'2", barrel-chested frame was imposing and contributed, with his boundless energy, to his dominance in bargaining encounters. See Michael Elliott, *Remembering Ambassador Richard Holbrooke*, TIME, Dec. 14, 2010, available at <http://www.time.com/time/nation/article/0,8599,2036847,00.html>.

3. See WAYNE WEITEN, PSYCHOLOGY: THEMES AND VARIATIONS 283 (2010) (discussing the unquestionably inherited nature of height). A high energy level, like intelligence, is a combination of nature and nurture. See *id.* The trait of intelligence remains the subject of scholarly controversy, recent scholarship acknowledges that intelligence is a property of human nature that is subject to environmental influences. See *id.* at 283-84.

determine one's capacity to galvanize others, forging consensus.<sup>4</sup> No matter how insightful a writer may be, no text—by itself—transmutes its reader into an indomitable, force-of-nature-charged neutral. For non-Holbrookian types, improvement in one's capacity to broker accords can be enhanced through adopting certain attitudes characteristic of the Five-Tool Mediator.<sup>5</sup>

Consider the technique utilized by most mediators in the ordinary course: The contestants were one of America's largest cities and an office building owner whose procedural due process rights were unmistakably violated by the municipality, although his damages were of questionable calculation.<sup>6</sup> During the mediation session, the mediator diligently performed customary tasks, urging serious assessment of litigation risk; commenting upon the causes of action, defenses, and claims of damages; conveying settlement proposals back and forth; and affording each party his candid assessment of the strengths and weaknesses of their respective

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4. As a boy, Winston Leonard Spencer Churchill adored his mother who, being a busy wife and hostess, had little time for him. PAUL JOHNSON, *CHURCHILL*, 8 (2009). Churchill regarded his father with fear and awe; the latter, a brilliant scholar, found Winston to be a disappointment, so also made little time for him. *Id.* at 9. A chubby youth, Winston performed poorly in school; he talked with a lisp and stuttered. *Id.* at 1, 9. Winston's searing ambition likely arose from his desire to win and maintain his absent parents' approval. *Id.* at 109-37. In time, parental distancing turned him into one of the most influential persons in modern British history, galvanizing a nation and its allies with his tough, tenacious leadership as Prime Minister during the Second World War. *Id.* At the age of 78, he won the Nobel Prize for Literature in 1953. *Id.* at 151. Churchill allegedly was left-handed, but he held his brush in his right hand while painting. *Id.* at 158. A second poor student, distanced from his parents and a contemporary of Churchill's, was Hitler, another galvanizing figure in European history.

5. The author uses the expression "mediator" throughout as a shorthand generic expression for those engaged in the processes of conciliation and other forms of facilitation toward consensus building. A discussion of varieties of facilitative dispute resolution is available in Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 185-90 (2003). In baseball parlance, for position players, the five tools are (1) hitting for average—lots of times on base—, (2) hitting for power—causing other runners to score runs—, (3) running speed, (4) arm strength, and (5) fielding ability. See MICHAEL M. LEWIS, *MONEYBALL: THE ART OF WINNING AN UNFAIR GAME* 3 (2003). Pitchers are regarded as having but three "tools": arm strength, command—the ability to throw consistently—of some number of different pitches, and overall control—the ability consistently to throw where the catcher "targets" the pitch to go by the batter. See Richard Wolfe, Patrick M. Wright & Dennis L. Smart, *Radical HRM Innovation and Competitive Advantage: The Moneyball Story*, 45 HUMAN RESOURCE MANAGEMENT 111, 115 (2006). Five-tool position players include household names like Willie Mays, Ken Griffey Jr., Barry Bonds, and Alex Rodriguez, the latter still playing for the New York Yankees. See Mark Bonavita, *Baseball's Five Tools*, BEST IN THE GAME ATHLETICS, LLC., Mar. 31, 1999, available at <http://www.bestinthegame.net/library/baseballs-5-tools>; Albert Chen, *Shin-Soo Choo, That's Who*, SPORTS ILLUSTRATED, Apr. 25, 2011, at 64.

6. This dispute eventually settled without the mediator's participation in the ultimate discussions, and is based on litigation in the United States District Court for the District of Arizona. See *Smith v. City of Phoenix*, CV-10-638-PHX-GMS (D. Ariz. 2010). The author served as mediator in the initial settlement conference.

[Vol. 12: 97, 2012]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

positions, including federal constitutional and ancillary state claims and defenses.<sup>7</sup> The parties offered a few grudging concessions but fewer overt admissions of weakness in their respective positions.<sup>8</sup> Indeed, the parties moved more than halfway closer to settlement—measured by demand and counteroffer—than when they began their session; still, at its close, no settlement resulted.<sup>9</sup> Instead, the parties departed with the mediator’s final estimation of “what it would take to resolve the matter.” Was this mediator’s performance worthy of his compensation? To what extent did the parties and their counsel share responsibility for the collective failure to achieve a resolution? Does the foregoing scenario resonate with your experience of facilitation?

This article encourages mediators to become inciters and advocates for an outcome that solves problems, irrespective of the amount in controversy and the initial “gap” between offers and counteroffers of settlement. This is not a “how to” article discussing facilitators’ tasks in settlement negotiations; instead, the reader should focus more on the mediator’s role in the process, advancing the value proposition in negotiations. The initial phase in reordering the thoughts of the mediator is to understand the binary-oppositions thought tendencies of the parties and their legal representatives; likely, all have attitudes that require retooling.<sup>10</sup>

This article does not propose that mediators become group therapists, but instead urges them to relentlessly explore (1) the essence of each party’s intentions and purpose within the controversy, and (2) a range of satisfactory outcomes from the perspective of each party. Once that is accomplished, the second, “incitement,” phase may commence. In this phase, three transitions must occur.<sup>11</sup> First, the concept of “wounding” must fade into the background while the concept of amelioration—the path most proximate to making each party whole—assumes the foreground.<sup>12</sup> During the first transition of the incitement phase, the warriors—those for whom the encounter’s savagery matters equally with the outcome—must be disarmed

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7. *See id.*

8. *See id.*

9. *See id.*

10. *See* Carrie Menkel-Meadow, *When Litigation is Not the Only Way: Consensus Building and Mediation As Public Interest Lawyering*, 10 WASH. U. J.L. & POL’Y 37, 50-51 (2002) [hereinafter Menkel-Meadow, *Consensus Building*].

11. *See* JULIE MACFARLANE, *THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW* ix-xii, 11-12, 86-87 (2008).

12. *See id.*

and converted into fellow seekers of imaginative solutions to the joint problems to be resolved.<sup>13</sup> This requires foremost that the mediators alter the mind-set of the adversaries from the “binary thinking”<sup>14</sup> realm.

The second transition of the incitement phase takes each party’s belief that a “win” is the ultimate goal, and converts this into an understanding that there is a problem to be solved, at the lowest possible cost, and in the most expeditious manner feasible.<sup>15</sup> Additionally, parties need to understand that such an outcome is as close to victory as may be realizable. This transition requires moving from pragmatic to imaginative thinking about a controversy’s resolution. A realistic perspective in a controversy, while helpful, is not all-sufficient to achieving a resolution in many cases unless a third-party adjudicator intervenes and directs the dispute’s outcome. The pragmatist negotiator’s perspective, that the dispute is a transaction whose terms have been written down but not yet agreed to, will not guide the parties down the path to resolution.<sup>16</sup> The appropriate perspective sees the dispute resolution environment as a white board, the problem set forth at the top, with the resolution schematic remaining to be written.<sup>17</sup> Here, every possible solution is available for capture, evaluation, and incorporation into an overall problem resolution.<sup>18</sup> The third transition of the incitement phase relates to trust—learning to accept evidence of trust extended by the other disputant and to extend indications of trust without expectation of reciprocity from the adversary.<sup>19</sup>

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13. *See id.*

14. *See infra* Part III.A. Computers use binary code; thus, the “brain” within the central processing unit recognizes only two states: “on” or “off.” *See The Journey Inside, Explore the Curriculum, Digital Information, Lesson 1: What is Binary Code?*, INTEL, [http://www97.intel.com/en/TheJourneyInside/ExploretheCurriculum/EC\\_DigitalInformation/DILesson1/](http://www97.intel.com/en/TheJourneyInside/ExploretheCurriculum/EC_DigitalInformation/DILesson1/) (last visited Mar. 1, 2012). Switches are arranged along Boolean guidelines, so that these two states establish circuits performing logical and mathematical operations. *See Binary—So Simple a Computer Can Do It*, KERRYR.NET, <http://www.kerryr.net/pioneers/binary.htm> (last visited Mar. 1, 2012). In neuropsychological terms, the human brain’s left hemisphere functions to naturally dichotomize, devising an “either/or” view of the world. *See* IAIN MCGILCHRIST, *THE MASTER AND HIS EMISSARY: THE DIVIDED BRAIN AND THE MAKING OF THE WESTERN WORLD* 137, 139 (2009) [hereinafter MCGILCHRIST, *THE DIVIDED BRAIN*].

15. Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 *UCLA L. REV.* 754, 764-68 (1984) [hereinafter Menkel-Meadow, *Structure of Problem Solving*].

16. This effectively recapitulates “adversarial negotiation,” a tendency that inhibits creativity in solution discovery, as well summarized by Professor Menkel-Meadow. *See id.* at 775-78.

17. Conceptualizing the negotiation process as a brainstorming, problem-solving session enables the discovery of unanticipated solutions. *See id.* at 819, 821-22.

18. *Cf. id.* at 772-75.

19. *See, e.g.*, COLIN F. CAMERER, *BEHAVIORAL GAME THEORY: EXPERIMENTS IN STRATEGIC INTERACTION*, 83-100 (2003).

[Vol. 12: 97, 2012]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Adopting these attitudes will set the facilitator on the path to becoming a Five-Tool Mediator. This article is not just valuable for mediators, but offers a lens through which to evaluate the talents of a prospective facilitator or to gauge a current facilitator's ongoing performance.

Section II of this article delves briefly into the influence professional baseball has had on the American culture and the lessons it teaches for use in facilitative processes in developing collaborative strategies. The remainder of the article describes the five tools of effective mediators.

## II. MEDIATOR LESSONS FROM PROFESSIONAL BASEBALL OPERATIONS

Professional baseball has a hold over a large portion of America's collective psyche, its storied narrative<sup>20</sup> and fascinating personalities richly texturing each phase of the national pastime. Perhaps to the dismay of idealists, professional baseball's off-field environment resonates with controversy and friction between and among: owners,<sup>21</sup> owners and players,<sup>22</sup> owners and managers,<sup>23</sup> owners and unions,<sup>24</sup> managers and umpires, managers and players,<sup>25</sup> players and umpires,<sup>26</sup> and players and society at large.<sup>27</sup>

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20. Certainly the most exhaustive non-print media treatment of the pastime is Ken Burns' series first produced for the Public Broadcasting System and aired initially in 1994, with a supplemental two part series called "The Tenth Inning" first broadcast in 2010. *Baseball: A Film by Ken Burns* (PBS television broadcast 1994) [hereinafter *Burns*], available at <http://www.pbs.org/kenburns/baseball/>. Recently, one of the fine American baseball writers reflected on the infusion of the game in American culture. See Joe Posnanski, *Loving Baseball: What Keeps the Grand Game Great?* SPORTS ILLUSTRATED, July 25, 2011, at 50.

21. See, e.g., ALBERT T. POWERS, *THE BUSINESS OF BASEBALL* 124, 221 (2003) (Bill Veek's marketing of on-field promotions frowned on by other owners).

22. Feuds between experienced players and owners arise during contract negotiations with the players' union, during salary arbitration—when it does proceed—, or via agents like Scott Boras. See, e.g., Ben McGrath, *The Extortionist*, THE NEW YORKER, Oct. 29, 2007, [http://www.nypost.com/p/sports/yankees/feuding\\_reggie\\_billy\\_push\\_885fHmgu7td4RetHQ3hfmO](http://www.nypost.com/p/sports/yankees/feuding_reggie_billy_push_885fHmgu7td4RetHQ3hfmO).

23. Kayla Webley, *Hiring and Firing Billy Martin*, TIME, July 13, 2010, available at [http://www.time.com/time/specials/packages/article/0,28804,2003503\\_2003501\\_2003497,00.html](http://www.time.com/time/specials/packages/article/0,28804,2003503_2003501_2003497,00.html).

24. See, e.g., POWERS, *supra* note 21, at 189-91, 280-82 (discussing owners' lockout of players); Ross Newhan, *Umpires' Union Adds Its Complaint to Mix*, L.A. TIMES, Dec. 23, 1994 (explaining that bargaining sessions between owners and the umpires' union were unsuccessful and umpires' lockout was threatened as of January 1, 1995).

25. See, e.g., Dick Schaap, *Feuding Reggie, Billy Push Steinbrenner to the Brink*, N.Y. POST, July 16, 2010, [http://www.nypost.com/p/sports/yankees/feuding\\_reggie\\_billy\\_push\\_885fHmgu7td4RetHQ3hfmO](http://www.nypost.com/p/sports/yankees/feuding_reggie_billy_push_885fHmgu7td4RetHQ3hfmO).

In addition to its controversy, professional baseball, suffused with tradition, has a history of hidebound resistance to evolution.<sup>28</sup> Consider, for instance, the “outlaw” brand<sup>29</sup> applied to innovators of the game who suggested professional baseball was entertainment, such as Bill Veeck, former owner of the Chicago White Sox,<sup>30</sup> or Charles O. Finley, former owner of the Oakland Athletics.<sup>31</sup> Any fan can recall the outcry accompanying changes such as adding new franchises,<sup>32</sup> moving franchises,<sup>33</sup> ball and bat “juicing,”<sup>34</sup> raising and lowering of the pitching mound,<sup>35</sup> and even the abandonment of mid-calf hosiery in favor of long pants.<sup>36</sup> Likely, three of the most controversial rule changes in modern professional baseball history are, the designated hitter,<sup>37</sup> the addition of teams to the postseason playoffs leading to the World Series,<sup>38</sup> and the

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26. See, e.g., Steve Wulf, *The Spit Hits the Fan*, TIME, June 24, 2001, available at <http://www.time.com/time/magazine/article/0,9171,134797,00.html>.

27. Some players are gifted with the capacity to alienate millions. Consider the cases of Pete Rose, late of the Cincinnati Reds; Manny Ramirez, late of the Boston Red Sox and Los Angeles Dodgers—playing in 2011 with the Tampa Bay Rays—; or Barry Bonds, late of the San Francisco Giants. Congressional investigations into baseball’s tolerance for substance abuse in 2005 and 2008 resulted from the public outcry over the behavior of players in uncertain numbers. See Lewie Pollis, *Barry Bonds, Pete Rose and the Most Polarizing Figures in MLB Teams’ Histories*, BLEACHER REPORT (June 7, 2011), <http://bleacherreport.com/articles/725895-mlb-pete-rose-barry-bonds-and-the-most-polarizing-figures-in-teams-histories#/articles/725895-mlb-pete-rose-barry-bonds-and-the-most-polarizing-figures-in-teams-histories>.

28. See Wolfe, Wright & Smart, *supra* note 5, at 115-16 (since Major League Baseball is tradition-bound, characterized by deep respect for convention and precedent, it has not changed much and is not prone to radical innovation; in short, the institution tends to reinforce the status quo).

29. ANDREW S. ZIMBALIST, *BASEBALL AND BILLIONS: A PROBING LOOK INSIDE THE BIG BUSINESS OF OUR NATIONAL PASTIME* 125 (1994) [hereinafter ZIMBALIST, *BASEBALL AND BILLIONS*].

30. See BILL VEECK & ED LINN, *VEECK—AS IN WRECK: THE AUTOBIOGRAPHY OF BILL VEECK* 40-41, 105, 118-20, 126, 387 (1962).

31. See G. MICHAEL GREEN & ROGER D. LAUNIUS, *CHARLIE FINLEY: THE OUTRAGEOUS STORY OF BASEBALL’S SUPER SHOWMAN* 48 (2010).

32. POWERS, *supra* note 21, at 143-48, 336-40.

33. *Id.* at 124-31.

34. *Id.* at 123, 222-24. See JASON TURBOW & MICHAEL DUCA, *THE BASEBALL CODES: BEANBALLS, SIGN STEALING, & BENCH-CLEARING BRAWLS: THE UNWRITTEN RULES OF AMERICA’S PASTIME* 187-91, 199-205 (2010).

35. WILLIAM F. MCNEIL, *THE EVOLUTION OF PITCHING IN MAJOR LEAGUE BASEBALL* 1-2, 121-22 (2006).

36. See POWERS, *supra* note 21, at 215, 221 (explaining that uniforms said to “look like pajamas”).

37. *Id.* at 222-24; see also GERALD W. SCULLY, *THE BUSINESS OF MAJOR LEAGUE BASEBALL* 65-66, 202 n.21 (1989).

38. POWERS, *supra* note 21, at 253, 281.

[Vol. 12: 97, 2012]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

banning fallout accompanying discovery of performance-enhancing drugs.<sup>39</sup> Albeit a traditions-based institution, social crises and cultural trends affect Major League Baseball (MLB)—including the clubs' ownership groups—no differently than other institutions of more recent vintages.<sup>40</sup>

Though the financial stakes of ownership and player compensation packages are astronomical,<sup>41</sup> and some subset of the participants seem perpetually at odds, neither the stakes nor the controversies have cast the participants in rigid behavior patterns. Indeed, some of the most creative problem-solving episodes in American business history have occurred within the confines of professional baseball, involving such issues as player contractual arrangements,<sup>42</sup> trades among clubs attempting to improve team skill level, the image of the team as a representative of its home, or the

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39. See, e.g., Paul D. Staudohar, *Performance-Enhancing Drugs in Baseball*, 56 LAB. L.J. 139 (2005); JASON PORTERFIELD, MAJOR LEAGUE BASEBALL: THE GREAT STEROID SCANDAL 6-15 (2009). Of course, the three true "revolutions" in the modern game of baseball were: (1) racial integration in the 1940s, see SCULLY *supra* note 37, at 172-74; (2) the introduction of free agency in the 1980s, *id.* at 37; and (3) the introduction of sabermetric measures—which are a system of mathematical models to evaluate a player's potential that marked a departure of seismic magnitude from the convention of applying lifetimes of scouting experience and observational instinct—to player evaluations. Brent C. Estes & N. Anna Shaheen, *Determinants of Value and Productivity in a Complex Labor Market: How Sabermetrics and Statistical Innovation Changed the Business of Professional Baseball*, 2 BUS. STUD. J. (SPECIAL ISSUE) 27, 31, 43-45 (2010), available at <http://www.alliedacademies.org/Publications/Papers/BSJ%20Vol%202%20SI%20No%201%202010%20p%2027-48.pdf> (last viewed Mar. 2, 2012). These phenomena were reactions to, or reflections of, contemporary social conditions, not "manufactured" changes by the stakeholders to innovate the sport. See also Burns, *supra* note 20. Ken Burns weaves the history of baseball into the social and economic trends of America's legacy in his PBS documentary on the game. *Id.* He recounts the Negro Leagues that provided separate and unequal opportunities for African-Americans, primarily in the 1920s through the 1940s. *Id.* As America changed, so did baseball. See *id.* In September 1945, five months after assuming office, President Harry S. Truman began the process of integrating the army; only a month later, Brooklyn Dodgers' General Manager Branch Rickey signed Jackie Robinson to a professional contract. See *id.*

40. For example, mass media reinforces culturally accepted notions about members of racial and ethnic groups, and baseball players are among those imprinted by the media with performance-suitable "traits." See, e.g., David C. Ogden, *The Welcome Theory: An Explanation for the Decreasing Number of African Americans in Baseball*, NINTH ANN. CONF. POCPWI, Nov. 15, 2004, at 52-53.

41. See e.g., POWERS, *supra* note 21, at 264-68, 317 (television revenues); *id.* at 269-71 (team payrolls); *id.* at 276-77 (franchise values); see also ANDREW ZIMBALIST, MAY THE BEST TEAM WIN: BASEBALL ECONOMICS AND PUBLIC POLICY 55-74 (2003) [hereinafter ZIMBALIST, BASEBALL ECONOMICS] (team profitability).

42. One illustration of such arrangements is player deferred compensation, especially in long-term contracts. See ZIMBALIST, BASEBALL ECONOMICS, *supra* note 41, at 113; see generally *infra* Part IV (describing the maneuvers in professional baseball).

economic viability of the franchise.<sup>43</sup> The ability to transform a leisure activity's competitive business model into a billion-dollar industry<sup>44</sup> renders settlement of complex conflicts a value-added proposition. A highly contentious and publicly exposed institution, like Major League Baseball, has bred creative problem solving via negotiating processes.

Mediators may be assured that the thorniest controversies are penetrable to solution if properly framed<sup>45</sup> and flexibly approached.<sup>46</sup> The following describes approaches to that exercise; as well as, for the public, suggestions for evaluating mediator candidates beyond considering their backgrounds in the facilitation field. There are four fundamental tools in addition to the essential tool of understanding the need to transform binary predisposition,<sup>47</sup> informing the thinking of the best mediators. Proper mediator attitudes increase the likelihood of better outcomes in resolving a dispute's underlying problems.<sup>48</sup> These tools are traits the big-league mediator should feature in her game.

### III. FIRST MEDIATOR TOOL: DEFLECTS BINARY OUTLOOKS ON A CONTROVERSY

#### A. *Transitioning from Binary Thinking*

A discussion of binary thinking begins with the thinking mechanism itself, the brain. The brain is segmented into two halves, the so-called "right brain" and "left brain,"<sup>49</sup> each possessing unique qualities that, in some

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43. Baseball has often been the pioneering sport when it comes to innovation and change in labor relations. See Paul Staudohar & Pedro Garcia-del-Barrio, *Have We Seen the Last of Baseball's Labor Wars?*, No. 0835 IASE CONF. PAPERS, June 2008. Besides having the first players' union, it was the first sport to introduce a strong, confrontational labor leader in Marvin Miller. See *id.* It was the first to have grievance arbitration. See *id.* Baseball made a major breakthrough in the form of player free agency. See *id.* It was the first to have a major work stoppage that interrupted the regular season. See *id.* Its pension system has always been on the cutting edge of professional sports. See *id.* Baseball is moving away from the conflict model toward a cooperative approach in which the interests of labor and management are joined. See *id.*

44. See ZIMBALIST, *BASEBALL ECONOMICS*, *supra* note 41, at 55-74 (discussing franchises value rankings).

45. See Menkel-Meadow, *Structure of Problem Solving*, *supra* note 15, at 803-13, 840.

46. See *id.* at 815-29.

47. See *infra* Part III.A.

48. See Dean G. Pruitt & Steven A. Lewis, *The Psychology of Integrative Bargaining*, in *NEGOTIATIONS: SOCIAL PSYCHOLOGICAL PERSPECTIVES* 161, 169-70 (Daniel Druckman ed., 1977).

49. See Graham B. Strong, *The Lawyer's Left Hand: Nonanalytical Thought in the Practice of Law*, 69 U. COLO. L. REV. 759 (1998). Strong's work, while related to the ways of lawyerly thought, is eclipsed in comprehensiveness of description of hemispheric specializations by the work of

[Vol. 12: 97, 2012]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

measure, would be wasted were it not for the collaborative activities of the other hemisphere.<sup>50</sup>

Understanding human brain function highlights the contrast in two perspectives: One views conflict as a binary process of reductionism and analysis on the one hand, and the second sees conflict as problem-solving exercise requiring a holistic approach to achieve a resolution.<sup>51</sup> Professor Graham Strong has explained, comprehensively, how brain function affects the lawyer's worldview.<sup>52</sup> The brain's two hemispheres are joined together by a massive nerve fiber band, but are essentially identical in size and form.<sup>53</sup> In function, they serve dissimilar yet harmonious purposes.<sup>54</sup> The left hemisphere, sometimes called the left brain (supporting the view that the brain is two organs instead of a single organ), enables humans to divide spatial relationships between objects, rotate images in the mind, discern patterns in what appears to be a random array, and generate an image of a whole object from fragmented parts.<sup>55</sup>

By contrast, the right hemisphere, or right brain, while vital to perception, is more abstruse in its cognitive value-added.<sup>56</sup> Essentially, its function is critical in perceiving emotional nuances,<sup>57</sup> in constructing a

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McGilchrist. See MCGILCHRIST, THE DIVIDED BRAIN, *supra* note 14, at 137, 139. The two hemispheres are not distinguished by what they do so much as by how they proceed with functioning, and the human brain is a mechanism that McGilchrist acknowledges is "a single, integrated, highly dynamic system." *Id.* at 34.

50. See Strong, *supra* note 49, at 764-74.

51. *Id.* at 773.

52. *Id.* at 759-60.

53. *Id.* at 764.

54. See *id.* at 764-74.

55. *Id.* at 771. The right hemisphere sees the whole before it is broken into parts; thus, its holistic processing is not based on summing those parts. Iain McGilchrist, *Reciprocal Organization of the Cerebral Hemispheres*, 12 *DIALOGUES IN CLINICAL NEUROSCIENCE* 503-15 (2010) [hereinafter McGilchrist, *Reciprocal Organization*], available at [http://www.lifespanlearn.org/documents/2011Handouts/McGilchrist/McGilchrist\\_2%202.pdf](http://www.lifespanlearn.org/documents/2011Handouts/McGilchrist/McGilchrist_2%202.pdf). That hemisphere's understanding is based on complex pattern recognition as well, enabling holistic, or *Gestalt*, perception; here, truth corresponds with something other than itself. *Id.* See also MCGILCHRIST, THE DIVIDED BRAIN, *supra* note 14, at 4, 46, 193; MICHAEL SHERMER, THE BELIEVING BRAIN: FROM GHOSTS AND GODS TO POLITICS AND CONSPIRACIES 5, 72, 120-27, 206 (2011) (explaining that the human brain, especially the right hemisphere, is hard-wired to detect patterns, even from meaningless data).

56. Strong, *supra* note 49, at 669.

57. *Id.* at 775. This feature is of considerable weight for those who hold that emotions are vital components of decisions and choices, to be factored into the weighing of gains and losses that lead to accepting or rejecting offers. See LEN FISHER, ROCK, PAPER SCISSORS: GAME THEORY IN

plausible and coherent narrative—and receiving the brain’s messages—, and “in the creative generation of hypotheses in the legal problem-solving process.”<sup>58</sup> While the left brain is arguably of greater utility in one’s scoring well on the Law School Admission Test, however, especially in the logical reasoning and “games” sections, achieving a superior score without the input of the right brain is exceedingly unlikely. The right brain’s creative generation of hypotheses for solving puzzles is key to their solution in the allotted time. While the left brain may predominate in couching an argument that leads to dismissing an opposing party’s claims on the narrowest conceivable procedural grounds, that capacity alone does not guarantee ultimate resolution of the conflict environment.

Additionally, the left brain is the portion that achieves reduction of phenomena, such as an array of facts or available arguments.<sup>59</sup> In “high gear,” the left brain atomizes such phenomena into what Professor Menkel-Meadow describes as definable, binary categories that admit of no interstitial alternatives except “null sets.”<sup>60</sup> Parties in conflict see such strict dichotomies as fact versus law, plaintiffs versus defendants, Republicans versus Democrats, conservatives versus liberals, and so forth.<sup>61</sup> Taken to ultimate lengths, one encounters the Manichean axis of good versus evil, and more pragmatically, the dichotomy of justice versus injustice.<sup>62</sup> In this binary environment, parties determine whether to implement reconciliation or accommodation through either negotiation or adjudication according to how they understand the opposing position asserted by the adversary.<sup>63</sup>

Identifying duality in opposition is the common manifestation of a binary thought process.<sup>64</sup> Because humans tend to organize the real world by segregating ideas, forces, and parties into categories and camps, there is a

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EVERYDAY LIFE 123-24 (2008). Fisher’s work is a basic primer on the essential principles of game theory that every person, earnestly engaged in facilitation whose practice requires a working knowledge of predicting outcomes, should read—essentially, all persons paid for being the neutral in facilitative processes. Game theory is the interdisciplinary study of human behavior focusing on rational choices of strategies and treating direct interactions between and among individuals as if it were a game with known rules and payoffs and in which all participants are trying to win. ROGER A. MCCAIN, *GAME THEORY: A NONTECHNICAL INTRODUCTION TO THE ANALYSIS OF STRATEGY* 19 (rev. ed. 2010).

58. Strong, *supra* note 49, at 775.

59. *Id.* at 771.

60. See Menkel-Meadow, *Consensus Building*, *supra* note 10, at 37, 39.

61. *Id.* at 50.

62. *Id.* at 39.

63. See *id.* at 39.

64. See *id.* at 39 (“There are two kinds of people in the world—those who divide things into two—and those who don’t.”).

[Vol. 12: 97, 2012]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

corollary tendency to polarize.<sup>65</sup> This fact, in combination with reduction of concepts into the most elementary issues, leads to the habit<sup>66</sup> of focusing upon the most narrow point and ignoring the perspective and appreciation of the entire landscape of a dispute.<sup>67</sup> With this thought process, one loses the capacity to integrate connected issues into an amalgam, defining a problem susceptible to solution.<sup>68</sup>

This inclination to atomize is prevalent among litigation attorneys.<sup>69</sup> Consequently, parties poised in diametric opposition entails the convenient separation into camps of win or lose, minority and majority rules, litigate or settle, the whole pie or a defense verdict.<sup>70</sup> Civil lawsuits and criminal prosecutions, however, are rarely binary-outcome events.<sup>71</sup> The decision to participate in a joint solution of a problem is infused with the vagaries of predicting (1) future events, (2) whether the facts and decision points have

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65. *See generally id.*

66. *See* Margaret S. Herrman, *Conclusion*, in *THE BLACKWELL HANDBOOK OF MEDIATION: BRIDGING THEORY, RESEARCH AND PRACTICE* 421, 424 (Margaret S. Herrman ed., 2006) (referring to the “reductionistic comforts of binary thinking”). McGilchrist acknowledges the left brain’s special capacity to focus on isolated pieces of information. *See* MCGILCHRIST, *THE DIVIDED BRAIN*, *supra* note 14, at 4. He equates reductionism to disengagement, causing left-hemispheric “vision” to make people feel powerful and the reductionist “knowingly superior.” *Id.* at 424.

67. *See, e.g.*, Menkel-Meadow, *Structure of Problem Solving*, *supra* note 15, at 784-89 (assuming that only one issue exists enables a person’s neglect of other issues or needs of the remaining parties).

68. *See id.* at 788-89.

69. I was engaged in a real property transaction in the mid-2000s with a Harvard Law graduate who, determined to prove himself the smartest person in the room, ground every legal or business issue he debated to powder in the hope of finding the winning argument in the dust of minutiae. The deal died, in large measure due to his efforts to have his camp’s position on each issue prevail and to the psychological weariness he promoted in every side’s negotiators. I believe this to be a product of his relative inexperience in negotiation as much as his submission to left hemispheric function. McGilchrist observes that left-hemisphere thinking is essentially decontextualized; consequently, there is a tendency toward inflexible focus upon the internal logic of a situation, ignoring what experience teaches in the overall circumstances. MCGILCHRIST, *THE DIVIDED BRAIN*, *supra* note 14, at 50. *See also* McGilchrist, *Reciprocal Organization*, *supra* note 55, at 325. The opposing party’s counsel had little sense of the flow of the negotiation, having transformed the discussion process—into a series of static points or moments, *see* MCGILCHRIST, *THE DIVIDED BRAIN*, *supra* note 14, at 139; *see* McGilchrist, *Reciprocal Organization*, *supra* note 55, at 326, rather than into an endeavor to reach a cooperative solution in which the parties commit themselves to a coordinated choice of strategies, *see* MCCAIN, *supra* note 57, at 51, 54.

70. *See* Menkel-Meadow, *Consensus Building*, *supra* note 10, at 39.

71. *Id.* at 40, 43.

been correctly communicated to the principals, (3) the principals' own biases and perceptions, and (4) predictions of the opposing side.<sup>72</sup>

If facilitative processes are viewed as binary, then counsel representing the parties typically will think in terms of the need to listen to the other parties, to process and understand the "other side's" information, and then to determine if "allowing my client to be persuaded through negotiation" or "moving the matter through adjudication" is the preferable course.<sup>73</sup> Professor Menkel-Meadow notes, hearing out the other stakeholders is falsely reductionist because some problems are not susceptible to identifying "winners" and "losers" at the conclusion of the conflict resolution vehicle.<sup>74</sup>

The binary thought process fails to recognize that frequently grades, or degrees of correctness of views and percentages of outcome achievement, are part of any problem-solving process.<sup>75</sup> Outcome achievement that is most productive is solution-based, not merely "assessment and dissection" based.<sup>76</sup> Defending the narrowest of positions on atomized issues diverts the parties from satisfactory problem solving.

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72. See Peter B. Friedman, *Losing \$500 Million Was a Legal Win: Outcomes and Predictions From a Lawyer's Point-of-View*, RULING IMAGINATION: LAW AND CREATIVITY BLOG (June 11, 2010), <http://blogs.geniocity.com/friedman/2010/06/losing-500-million-was-a-legal-win-outcomes-and-predictions-from-a-lawyers-point-of-view/>. Dealing with such vagaries lies within the realm of right-hemispheric function, dealing with real world phenomena—as opposed to abstractions—, observing each thing in its context, in a qualifying relationship with its surroundings. MCGILCHRIST, *THE DIVIDED BRAIN*, *supra* note 14, at 49-50.

73. See Menkel-Meadow, *Consensus Building*, *supra* note 10, at 39.

74. *Id.* at 40. The exercise of consensus building as joint problem solving requires, initially, refocusing the parties from the articulation of a personal grievance—the foe "screwed me"; the foe "deserved nothing different"—to the identification by each party, camp, or stakeholder of a problem. This centers the parties in resolving problems as contrasted with wounding. First, therefore, the mediator must compel the foes to identify a problem without reference to the actions or purposes of the other side. For instance, viewing the hypothetical in Part I, see *supra* pp. 98-99, the property owner must be guided to say, "My problem is that I cannot achieve the return on my investment [in a lot that was zoned commercially] if the property cannot be used for some commercial purpose"; while the municipality must be guided to say, "Our problem is that if we permit a parcel situated in the middle of a residential area to be used commercially, there is no consistency in the zoning ordinance's application, and neighborhood disruption and public mistrust results." The second step is for the mediator to synthesize the articulated self-interested problems into a joint problem lending itself to a mutually acceptable, if not—to any foe—completely satisfying, solution. In this instance, one plausible solution was the granting of certain zoning adjustment relief that would have permitted a non-permanent, quasi-commercial use of the parcel (in some jurisdictions known as a "home occupation") while retaining the property's residential zoning.

75. PAUL F. WILSON, LARRY D. DELL & GAYLORD F. ANDERSON, *ROOT CAUSE ANALYSIS: A TOOL FOR TOTAL QUALITY MANAGEMENT* 56, 89-90 (Jeanine L. Lau & Mary Beth Niles eds., 1993).

76. See, e.g., Menkel-Meadow, *Structure of Problem Solving*, *supra* note 15, at 790 (illustrates an assessment strategy based on a "what the court might do at trial" risk-assessment). See also Friedman, *supra* note 72, for an illustration of how the "loser" can win a significant victory in litigation. Exxon won its litigation with the government by paying more than \$507.5 million in

[Vol. 12: 97, 2012]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

*B. Surmounting the Barrier of Pragmatism: Destabilization and Game Theory*

Collaborative processes gain momentum when threats of legal action or other imminent crises to the stability of the existing order—such as natural calamities or regime change<sup>77</sup>—are taken seriously by opposing stakeholders.<sup>78</sup> In the legal realm, these are referred to by some scholars as “legal destabilization rights.”<sup>79</sup> Fear of the consequences of forthcoming regulatory implementation causing an unwanted change in business conditions<sup>80</sup> is an illustration of events promoting the proper “crisis” mentality bringing stakeholders together to bargain.

Historically, professional baseball management has invoked three such destabilization rights. The first is the threat of contraction in the number of major league teams, attempted in both 2001 and 2006.<sup>81</sup> On November 6, 2001, the owners voted to eliminate two MLB teams, alleging that contraction—from thirty to twenty-eight teams—would materially help the finances of the remaining teams.<sup>82</sup> The timing of the vote suggested,

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punitive damages, because the amount originally awarded against the corporation was \$5 billion. *Id.* The notion that *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), represented a final pronouncement of defeat for the oil conglomerate misses the critical point of victory; rather, it established that maritime law’s upper limit for punitive damages is a 1:1 ratio to the awarded compensatory damages. *Id.* This represented a far greater triumph for the entire oil industry than the value of the damages paid by Exxon. *Id.*

77. Altering an unsatisfactory status quo via pursuit of destabilizing goals is one tenet of recent American foreign policy. See Stephen Sestanovich, *American Maximalism*, NAT’L INT., Mar. 1, 2005, at 13, 20-21.

78. See Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1020 (2004).

79. See *id.* at 1016.

80. See Carrie Menkel-Meadow, *Getting to “Let’s Talk”*: Comments on Collaborative Environmental Dispute Resolution Processes, 8 NEV. L.J. 835, 843 (2008) [hereinafter Menkel-Meadow, *Getting to “Let’s Talk”*].

81. See John T. Wolohan, *Major League Baseball Contraction and Antitrust Law*, 10 VILL. SPORTS & ENT. L.J. 5, 5 (2003). The year 2006 was a significant time because the Basic Agreement with the Major League Baseball Players Association expired after the 2006 season; that agreement contained a provision that obligated the players not to contest the contraction by no more than two teams, so long as the decision about the nature of the contraction was communicated by July 1, 2006. See Scott R. Rosner, *The History and Business of Contraction in Major League Baseball*, 8 STAN. J.L. BUS. & FIN. 265, 266 (2003).

82. See Wolohan, *supra* note 81, at 5. That this threat was destabilizing to many is suggested by the outpouring of legal scholarship on the subject of contraction following the announcement, including the Symposium in Volume 10 of Villanova’s Sports and Entertainment Law Journal to

however, a different motivation by the owners. The initial intention may have been to weaken the players' union, while further attempting to compel cities to reconsider demands by the owners that there be municipal subsidies of baseball stadiums.<sup>83</sup> The second destabilizing tactic is the threat of a player lockout.<sup>84</sup> Finally, the third tactic is threatening franchise relocation in an effort to exact larger public subsidies from city governments and taxpayers.<sup>85</sup>

Mediators not backed by governments have little power to bring about credible threats of material destabilization.<sup>86</sup> They lack the power to introduce "urgency triggers," to contemplate immediate joint problem solving—with a few exceptions. One strategy that may bear fruit, by analogy, is urging the disputants to proceed with "baseball arbitration," or final-offer arbitration as it is called in the dispute resolution practitioner community.<sup>87</sup> Salary arbitration is one element of the Basic Agreement between the owners and the players' union that mandates final-offer arbitration for players who complete three years of league service in Major League Baseball.<sup>88</sup> Final-offer arbitration has the ability to deter entrenched positions on either side.<sup>89</sup> Usually, the specter of possible failure compels

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which Professor Wolohan contributed his paper. *See generally id.* The contraction was controversial in many circumstances. *See* POWERS, *supra* note 21, at 308-10.

83. ZIMBALIST, *BASEBALL AND BILLIONS*, *supra* note 29, at 136-40.

84. Of course, this threat is a double-edged sword because the players' union also can threaten a strike. Between 1972 and 1994-95, every round of negotiations between the owners and players produced either a strike or a lockout. *See* Paul D. Staudohar, *Baseball Negotiations: A New Agreement*, MONTHLY LAB. REV., Dec. 2002, at 15-16.

85. *See* ZIMBALIST, *BASEBALL ECONOMICS*, *supra* note 41, 124.

86. *Cf.* Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARA. L. REV. 1015, 1054, 1056 (2004) (once parties to a dispute have joined issues in litigation, only a limited range of interventions—whether an injunction or damages—are available to establish a "mandate" for resolution and those are outside the province of the mediator in private civil litigation).

87. *See* Amy Lok, *Final-Offer Arbitration*, 10 ADR BULL., no. 4, 2008 at 1-2, available at [http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1431&context=adr&sei-redir=1&referer=http%3A%2F%2Fscholar.google.com%2Fscholar%3Fhl%3Den%26q%3DAmy%2BLok%2Bfinal%2Boffer%26btnG%3DSearch%26as\\_sdt%3D1%252C3%26as\\_ylo%3D%26as\\_vis%3D0#search=%22Amy%20Lok%20final%20offer%22](http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1431&context=adr&sei-redir=1&referer=http%3A%2F%2Fscholar.google.com%2Fscholar%3Fhl%3Den%26q%3DAmy%2BLok%2Bfinal%2Boffer%26btnG%3DSearch%26as_sdt%3D1%252C3%26as_ylo%3D%26as_vis%3D0#search=%22Amy%20Lok%20final%20offer%22).

88. *See* Basic Agreement art. VI, § F(1) (2007-2011), available at [http://mlbplayers.mlb.com/pa/pdf/cba\\_english.pdf](http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf) (agreement between the American League of Professional Baseball Clubs, National League of Professional Baseball Clubs, and Major League Baseball Players Association). For background on the use of final offer arbitration in baseball, see ZIMBALIST, *BASEBALL AND BILLIONS*, *supra* note 29, at 82-83; SCULLY, *supra* note 37, at 161-65.

89. *See* Lok, *supra* note 87, at 1. Baseball's arbitration system is designed to encourage negotiation between the parties, and the system has had that effect. *See* David J. Faurot & Stephen McAllister, *Salary Arbitration and Pre-Arbitration Negotiation in Major League Baseball*, 45 INDUS. & LAB. REL. REV. 697, 701 (1992). The baseball arbitrator has only twenty-four hours to

[Vol. 12: 97, 2012]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

the parties to take their positions to a level of analysis characteristic of most early term and even mid-term dispute evaluations.<sup>90</sup> Recent player contract negotiations suggest that owners, in an effort to avoid a hearing, continue to make players progressively more lucrative offers in the days and hours closely preceding the time of the hearing.<sup>91</sup>

If the mediator encourages a swift resolution, coupled with the certainty of exposure, the parties in all likelihood will move instead toward more realistic positions in joint problem solving. Pushing for final-offer arbitration motivates negotiation-type processes; under the threat of destabilization, stakeholders are forced to at least consider whether they actually believe the positions they are asserting in a more quantitative, less emotional way.<sup>92</sup>

Mediators will seldom have destabilization as a “weapon” against binary thinking; however, a less stressful approach is applying a select number of principles of game theory to these parties’ polarized positions. The mediator must prevent the foes from escalating the conflict by directing them from a

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choose one of the offers made for the player’s salary, and the club and player have only one hour apiece to present evidence, creating a high-stakes urgency for the hearing itself. *See id.* at 698-99.

90. *See* SCOTT R. ROSNER & KENNETH L. SHROPSHIRE, *THE BUSINESS OF SPORTS* 376 (2d ed. 2011) (salary arbitration typically increases player compensation above its prior level and results in more realistic offers being produced).

91. *See* Ken Peters, *Ethier, Dodgers Reach Agreement*, AZCENTRAL.COM (Feb. 17, 2009, 1:41 PM), <http://www.azcentral.com/sport/diamondbacks/cactus/articles/2009/02/17/20090217spt-ethier-dodgers-reach-agreement> (club and player delayed the time of the arbitration hearing so the sides could continue to negotiate in the antechamber of the hearing room). One theory often repeated for the owners’ conduct in last minute contract concessions is that salary arbitration is a process with great likelihood for spoiling the atmosphere on the team because the owner’s representatives must argue to the arbitrator in detail about the inferior value of the player, implicitly denigrating the talent—inherent worth—of the player. *See id.* Ironically, this form of dispute resolution is binary in that the neutral party accepts only one of the two opinions of value without adopting a middle ground. *See supra* Part III. In January 2012, the sides again avoided arbitration by ageing to a one-year, \$10.95 million contract after he was paid \$9.25 million in 2011. *See Andre Ethier Re-Signs with Los Angeles Dodgers for One-Year, \$10.95 Million Deal*, AZCENTRAL.COM (Jan. 17, 2012 1:12 PM), <http://www.azcentral.com/sports/diamondbacks/articles/2012/01/17/20120117andre-ethier-re-signs-los-angeles-dodgers-one-year-million-deal.html>.

92. A more mathematical assessment, based on Nash bargaining solutions premised on a Nash Equilibrium, is found in Faurot & McAllister, *supra* note 89, at 701-04. The authors conclude that for best results, the player should reveal risk-neutral preferences when bargaining will yield the Nash Solution based on the revealed preferences. *Id.* at 710. The Nash Solution posits that where any finite resource is to be divided, rational participants will choose a division of the resource that maximizes the product of their utility functions. *See* FISHER, *supra* note 57, at 120.

posture of “tit-for-tat,”<sup>93</sup> a conditional cooperative strategy based on threat of reprisal, toward a more broadly cooperative “I’ll scratch your back if you do likewise” duality based on reciprocity of good will.<sup>94</sup> Game theory<sup>95</sup> affords insights into the evolution of cooperation, but in the process, it issues two challenges to the facilitative process participants. The first is how the participants can reach coordinated agreements.<sup>96</sup> The second is devising a means to compel coordinating persons to remain loyal, cooperative members of the group, while sticking to their agreements.<sup>97</sup>

The dilemma of non-cooperating persons can be summarized by assessing the Nash equilibrium.<sup>98</sup> This equilibrium is the consequence of

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93. See FISHER, *supra* note 57, at 155-83. A player using a tit-for-tat strategy initially cooperates with the other player and thereafter copies the strategy that second player uses on a prior move in an “alternating turns” mode. ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 36-39, 113-20, 136-37 (1984). Thus, a player cooperates and continues to do so as long as there is reciprocity from the other player. *Id.* The tit-for-tat strategist thus is never the first to “defect,” but the player will respond to defection with a counter defection. *Id.* The ultimate expression of tit-for-tat in baseball is known as pitcher retaliation. See TURBOW & DUCA, *supra* note 34, at 97-131; Nick Picoro, *MLB Suspends Arizona Diamondbacks Manager Kirk Gibson, Reliever Esmerling Vasquez*, ARIZONA REPUBLIC, June 7, 2011, <http://www.azcentral.com/sports/diamondbacks/articles/2011/06/07/20110607arizona-diamondbacks-manager-kirk-gibson-reliever-esmerling-vasquez-suspended.html#ixzz1OnJ2ELyx>.

94. See FISHER, *supra* note 57, at 9.

95. Game theory is felicitously defined as a scientific “guide to decision making that gives us pointers to what is really going on,” by “imposing logical discipline on the stories we tell.” See *id.* at 122.

96. See *id.* at 31.

97. See *id.* at 23, 60.

98. See *id.* at 23-29. Consider the following baseball illustration of applied game theory involving the classic duel between a pitcher and base runner over advancing from first to second or second to third base by “stealing” the base—beating the application to the runner of a “tag” by the fielder of the ball. The base runner presses for advantage, attempting to distract the pitcher with a “lead” off the base, like a sideways-scuttling crab darting out of and back into his hole. The pitcher, Catfish, changes his delivery to the stretch and demonstrates his best pick-off moves, forcing the runner to dive back to first. The base runner, Maury, has two alternative strategies: to run or to remain on base. The pitcher has two choices: to throw to first—in attempt to pick the runner off—or not. Of course neither does exclusively one or the other all the time. They randomize their actions to keep the opponent guessing. In fact, some baseball statisticians hold that pitchers and runners have randomized their play such that the probability of the runner reaching second is exactly balanced in the case the runner attempts to steal or not. Otherwise, the pitcher or the runner is not playing optimally. Imagine if the probability of reaching second were higher if Maury did not attempt to steal. Here, his best play is to not attempt to steal because it maximizes his chance of reaching second. Knowing that, Catfish’s best play is not to try to pick him off—which runs the risk of throwing the ball away, letting Maury reach second with ease. But if Catfish is not going to attempt a pickoff, Maury should attempt to steal. But if Catfish knows Maury will attempt to steal, he will try to pick him off, and so anticipation reciprocates. This is not equilibrium. A similar argument assumes that the probability of reaching second is higher if the runner attempts to steal. In game theory terms, there is no pure strategy solution (that is, Nash equilibrium) for either player. Neither Maury nor Catfish can do just one thing all the time, and neither can assume the other will

[Vol. 12: 97, 2012]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

two sides having selected a strategy that neither side can then deviate from without ending up in a less desirable position.<sup>99</sup> So long as both sides act only to advance their own interests, the Nash equilibrium continues to trap the parties. If a negotiated resolution is not of Nash equilibrium, one or both sides can improve their position by breaking the cooperative agreement—sometimes called “defecting” or “cheating.” However, when a negotiated agreement is of Nash equilibrium, both sides will lose their advantage if they decide to defect.<sup>100</sup> The mediator who applies game theory must persuade each side that the perceived incentive to defect—the possibility of doing better by breaking the cooperative agreement—has been eliminated.<sup>101</sup> So persuaded, the parties will behave in a manner such that the negotiated settlement will last.

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do one thing all the time. Both must play a mixed strategy of randomizing between the two alternatives. It is illogical for the optimal random mixes of the two players over their respective strategies to give rise to a probability of success for one choice higher than the probability of success for another. Once you make such an assumption, you get caught in the loop of indecision. Such is a fundamental truth in game theory. The probable payoff for each of the pure strategies—attempt to steal, not attempt to steal; make a pickoff throw, no pickoff throw—that are mixed together by a player must be equal. The probability Maury will reach second if he attempts to steal must equal the probability he will reach second if he does not attempt a steal. However, that does not mean Catfish should ignore Maury, which would be equivalent to Catfish playing the pure strategy of not making any pickoff throws to first. We know from above that a pure strategy cannot be optimal. The only way optimal (Nash equilibrium) play is achieved is if Catfish plays the mixed strategy that all pitchers play—throw to first base with some frequency strictly greater than zero and strictly less than one. See Austin Frakt, *The Game (Theory) Within the Game*, THE INCIDENTAL ECONOMIST (Aug. 24, 2009, 4:00 AM), <http://theincidentaleconomist.com/wordpress/the-game-theory-within-the-game/>.

99. See FISHER, *supra* note 57, at 18. The Nash equilibrium posits that each participant will select a strategy that is optimal for participation given the fact that other “players” are doing likewise. John F. Nash, *The Bargaining Problem*, 18 *ECONOMETRICA* 155, 155-62 (1950). Of course, game theory’s fundamental assumption is that decision makers are rational actors pursuing their respective self interests with the expectation that the other actors are similarly motivated. See AXELROD, *supra* note 93, at vii.

100. FISHER, *supra* note 57, at 29.

101. *Id.* at 83.

#### IV. SECOND MEDIATOR TOOL: TRANSFORMS ZERO-SUMMING INTO JOINT PROBLEM-SOLVING

##### A. *Converts Parties' Perspectives from Winning and Losing*

Mediators must get the parties past their tendencies to interpret the world in binary oppositions. This can be accomplished by illustrating to the parties that participating in the dispute problem-solving process does not mean solely choosing between cooperating and “going for broke” in an adjudication proceeding. Additionally, the facilitator must minimize the tendency to see issues as limited in number or as reducible to finite, discreet parts. Instead, the facilitator presents a vision of complementary desires that allows the parties to share resources and opportunities.<sup>102</sup> Moving forward, the facilitator understands that more trades between or among the stakeholders allows more solutions to emerge.<sup>103</sup> Moreover, the facilitator must minimize the narrow view that parties are battling over thereby preventing a joint resolution.<sup>104</sup>

To encourage abandonment of win-lose binary perspectives as well as the “win-win” bias, the facilitator must provide an accurate description of how joint problem solving may produce “better than” outcomes.<sup>105</sup> In this regard, the apt analogy is the trade of MLB players in which a deal makes sense for both teams rather than one side getting the better of the other.<sup>106</sup> Indeed, an arm’s length trade is not a zero-sum operation.<sup>107</sup> J.C. Bradbury, a leading baseball economist, discourages the view that one team bests the other in each player trade: “Rather than trying to identify winners and losers, it’s best to first try to understand why the trade happened. . . . Most times I find that deals make sense for both sides, as economic theory predicts. Mistakes happen, but as a general rule, all parties to trades are winners.”<sup>108</sup>

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102. See Menkel-Meadow, *Getting to “Let’s Talk”*, *supra* note 80, at 849.

103. See Menkel-Meadow, *Consensus Building*, *supra* note 10, at 43.

104. See *id.* at 48-49.

105. See Menkel-Meadow, *Getting to “Let’s Talk”*, *supra* note 80, at 839-40.

106. See generally J.C. BRADBURY, *HOT STOVE ECONOMICS: UNDERSTANDING BASEBALL’S SECOND SEASON* (2011).

107. See *id.* at 18.

108. BRADBURY, *supra* note 106, at 19. Bradbury’s observation is a reasoned summary of how, if team’s managements cooperate and communicate their intentions with each other, each trading “partner” has the potential to improve its lot in the long run. *Id.* See also AXELROD, *supra* note 93, at 122-23.

[Vol. 12: 97, 2012]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

*B. Persuades the Stakeholders to Communicate and to Coordinate Their Strategies*

Mutual benefit is a reasonable expectation for parties in transaction negotiations. In dispute negotiations, a more realistic expectation may simply be to improve communication between the parties in negotiations.<sup>109</sup> The mediator's task is persuading the stakeholders that ongoing communication and coordination of strategies will produce greater satisfaction and a fairer outcome; additionally, such a process heightens the likelihood of voluntary compliance with the final agreement.<sup>110</sup>

Communication is key to negotiating coordinated strategies.<sup>111</sup> However, to enable constituent members to coordinate strategies, the communication must be directed toward establishing coalitions.<sup>112</sup> When strategies are coordinated among stakeholders, potential cooperative solutions rise to the surface of the negotiations.<sup>113</sup> If the adversaries can arrive at a cooperative solution, any nonconstant sum game is convertible to a win-win scenario.<sup>114</sup> In the Pareto optimal state,<sup>115</sup> a solution, or series of solutions, to a conflict can be derived by the negotiating parties and facilitator, thereby rendering each party as well off as possible without

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109. See Menkel-Meadow, *Consensus Building*, *supra* note 10, at 42-43.

110. See *id.* at 53.

111. See FISHER, *supra* note 57, at 75.

112. See *id.* at 113. A dominant strategy equilibrium, where each participant in the game has a dominant strategy, is a noncooperative equilibrium in which no player coordinates his choice of strategies; instead, participants commit themselves to a coordinated choice of strategies whereby, those chosen strategies constitute a cooperative equilibrium. MCCAIN, *supra* note 57, at 54-56.

113. See FISHER, *supra* note 57, at 113. See also MCCAIN, *supra* note 57, at 51, 54.

114. See FISHER, *supra* note 57, at 113.

115. Pareto efficiency is named for Vilfredo Pareto, an Italian economist who studied economic efficiency and income distribution. See Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211, 1215 n.14 (1991). Pareto posited that a different allocation of resources among a set of individuals that makes at least one individual better off without making any other individual worse off is called a Pareto Improvement; and, Pareto optimality—or efficiency—is the state where no further Pareto Improvements are possible. *Id.* at 1211, 1216-17, 1234-35. “Better off” means being put in a preferred position to the one just previously occupied by an individual. *Id.* And “not worse off” allows for the compensation for a loss while retaining an efficiency gain to be realized by others, although it is theorized by economists that the party “not worse off” is not fully compensated for their loss at times. *Id.* One of Pareto's chief critics as applied to the realm of legal disputes is Guido Calabresi, who rejects the notion of Pareto optimality. *Id.*

inflicting unnecessary harm to the other disputants.<sup>116</sup> Pareto optimization is the economists' way of describing the ideal state following the parties' joint implementation of strategies for minimally effective cooperation.<sup>117</sup> Minimally effective cooperation is efficient when there is no alternative arrangement of strategies allowing one or more persons to be better off in their particular circumstances without the other parties' circumstances worsening.<sup>118</sup>

## V. THIRD MEDIATOR TOOL: NEUTRALIZES NAY-SAYERS AND ENGENDERS STAKEHOLDER TRUST

### A. *Sometimes You Have to Run the Bum*

Two of the most winningest managers in Major League Baseball history are Earl Weaver<sup>119</sup> and Bobby Cox.<sup>120</sup> Likely not a coincidence, these passionate leaders were also the managers most frequently ejected from games.<sup>121</sup> This no doubt stemmed from a passion for their team's advantage in the game overcoming their reason at some moment. Therefore, when the umpires—charged with keeping order and forward momentum—sensed that having them continue in their managerial roles would be unproductive, the only solution was an early managerial exit where their protests and negative attitudes could not stymie the contest's progress.<sup>122</sup> The productivity of the belligerent's participation, in this context, had ceased.

Similarly, mediators are occasionally confronted by parties who neither seek a solution to a joint problem nor respect the problem-solving method, but instead remain stuck in a binary state or adopt a posture solely for the

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116. *Id.* at 1216-17. *See also* HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* 139 (1982).

117. *See* FISHER, *supra* note 57, at 117.

118. *See id.*

119. *See* SCULLY, *supra* note 37, at 189-90.

120. *See* ED RANDALL, *BASEBALL FOR THE UTTERLY CONFUSED* 97 (2010); SCULLY, *supra* note 37, at 189-90.

121. RANDALL, *supra* note 120, at 217.

122. Of course, umpires have egos and upper limits to their tolerance for verbal and other abuse, and sometimes they have bad days. Even so, umpires are trained to give players and managers certain latitude, so long as their conduct does not indicate an intention to disrupt the proceedings with childlike acting out. The fans are at the game to witness the acts of the players and managers, even their antics, as opposed to those of the mediator, a fact worth recalling by the umpires. *See Crooked Umpires?*, *BASEBALL FEVER* (last visited Nov. 16, 2011), <http://www.baseball-fever.com/archive/index.php/t-56683.html>.

[Vol. 12: 97, 2012]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

purpose of wounding their opponents.<sup>123</sup> Agreed mediation may suggest a joint desire for problem solving; however, an agenda by one stakeholder's representative may preclude finding a solution.<sup>124</sup> If that individual, like an enraged baseball manager, is so incensed by perceived injustice or genuinely believes himself the control party or the "smartest person in the room," the interests of the stakeholders may best be served by excluding that individual from the proceedings.<sup>125</sup> The mediator, contemplating such action, needs to understand the purpose of that individual's participation, especially whether that individual—whom I call, for convenience, the "consigliere"—is the fundamental decision maker for that stakeholder.<sup>126</sup> If the mediator does not have such authority, he will need acquiescence in "running" or ejecting the consigliere, unless the consigliere is a milquetoast, cowed by the mediator's strength of personality.<sup>127</sup>

Running the consigliere is a delicate art indeed. The decision maker may erroneously believe that his consigliere is valuable, either as a "bad cop" or "trusted advisor."<sup>128</sup> Perhaps the decision maker believes the consigliere influences the results of the problem-solving discussions because opponents perceive him as formidable, a menacing force that refuses to capitulate to the other stakeholder's demands.<sup>129</sup> Perhaps the decision maker genuinely relies on the views of the consigliere or believes him to have particular expertise in the subject matter of the dispute.<sup>130</sup> However, if the mediator is too insistent on excluding the consigliere from deliberations, the mediator's intentions may be read as reflecting bias, negatively impacting problem-solving momentum.<sup>131</sup> But if the mediator's instinct is that

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123. See WILSON, DELL & ANDERSON, *supra* note 75, at 55; see generally THE NEGOTIATOR'S FIELDBOOK: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006) [hereinafter THE NEGOTIATOR'S FIELDBOOK].

124. See generally THE NEGOTIATOR'S FIELDBOOK, *supra* note 123.

125. See generally *id.*

126. See generally *id.*

127. See generally *id.*

128. See David F. Sally & Kathleen M. O'Connor, *Negotiating in Teams*, in THE NEGOTIATOR'S FIELDBOOK: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR 547, 549-50 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006) (discussing the good cop/bad cop tactic).

129. See generally THE NEGOTIATOR'S FIELDBOOK, *supra* note 123.

130. See generally *id.*

131. See Roy J. Lewicki, *Trust and Distrust*, in THE NEGOTIATOR'S FIELDBOOK: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR 191, 191-99 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006).

progress is essentially being stymied by continuing involvement of the consigliere, there is little to lose by recommending either the consigliere take his leave or, alternatively, the consigliere be assigned another task—for example, modeling some settlement scenarios or mining additional facts—that requires his separation from immediate participation in the conference.<sup>132</sup>

The obstreperous lawyer for a stakeholder presents a difficult quandary for the mediator.<sup>133</sup> A lawyer may not be acclimated to the environment of collaborative conversations directed toward problem solving, and therefore may lack faith in the process.<sup>134</sup> The mediator must accept that an innovative approach to problem solving threatens those having a vested interest in maintaining the status quo, and that vested interest may run so deep as to override technical rationality.<sup>135</sup> The mediator's innovative approach may be perceived as a threat to the lawyer's traditional skill set and even the job security of the well-seasoned lawyer used to the fact-finding process of discovery and trial cross-examination.<sup>136</sup> Further, a lawyer with a competitive personality may feel superior to the mediator based on

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132. The author during one negotiation ordered a representative of his own client to be silent and to remain so for the balance of the meeting and stared down the representative, challenging him to defy his directive. The client's representative broke off the mutual stare, sulking instead in a corner of the conference room. The decision maker for the other camp was sufficiently impressed by the fact that an opposing camp member recognized the negative inputs of his opponents' consigliere that he became convinced of the other representatives' sincere intentions to resolve problems. This confidence building enabled a settlement in principle to be reached in under ten minutes following the author's confrontation with the consigliere. Every person in the room reached the judgment that the consigliere was determined to keep the pot stirred and productive negotiations stymied. Decision makers who are experienced in business matters know their personnel and what each contributes to problem-solving processes; however, at times they simply have to be reminded of these persons' capacities. Likewise, the mediator has to be careful to differentiate between a party's intention to make trouble and inability to articulate his point. This is not so difficult a diagnosis, scientists estimate that over ninety percent of communication between humans is nonverbal—whether through body language, vocal intonation, or otherwise. MCGILCHRIST, *THE DIVIDED BRAIN*, *supra* note 14, at 106. Verbal and physical explosions occurring in negotiations may be the consigliere's expressions of a desire to dominate the proceedings by aggressive manipulation where reason will be unavailing.

133. See generally *THE NEGOTIATOR'S FIELDBOOK*, *supra* note 123.

134. See Gale Miller & Robert Dingwall, *When the Play's in the Wrong Theater*, in *THE NEGOTIATOR'S FIELDBOOK: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR* 47, 53 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006). The authors note that attorneys can create impediments to conflict resolution by insisting that clients conform to the attorneys' preferred orientation, citing the work of sociologist Joseph Hopper. *Id.* (citing Joseph Hopper, *Contested Selves in Divorce Proceedings*, in *INSTITUTIONAL SELVES: TROUBLED IDENTITIES IN A POSTMODERN WORLD*, 127, 127-41 (Jaber F. Gubrium & James A. Holstein eds., 2001).

135. See Wolfe, Wright & Smart, *supra* note 5, at 115.

136. Cf. Wolfe, Wright & Smart, *supra* note 5, at 115-16.

[Vol. 12: 97, 2012]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

experience in practice;<sup>137</sup> command of the dispute's immediate facts; or another, less relevant criterion. The lawyer may feel she has an equal or more valid notion of what just resolution of the joint problem entails. However, while this may be a legitimate posture for the lawyer, having such a view is very different from actually employing game-playing maneuvers to block any problem-solving result.<sup>138</sup>

A variety of approaches are useful in these conditions. First, it is necessary for the mediator to address the principals at least as intently as their advocates, reflecting the appropriate deference to the real decision makers.<sup>139</sup> Therefore, it is beneficial to remind counsel, clearly bent on blocking progress, that further retarding a resolution when the principal has expressed a desire to settle is a breach of the lawyer's ethical obligations.<sup>140</sup> Respectfully driving this point home to recalcitrant counsel may lubricate the facilitative process. Another technique for disarming obstreperous counsel is for the mediator to subtly make the point that he is willing to share ownership of proffered solutions but not *authorship* of them; thus, the solutions presented are not subject to revocation by counsel without the prior direct input of his principal's leadership.<sup>141</sup> Finally, the mediator may need to remind counsel that, while "wounding" the adversary is well suited to a criminal justice process, the ambition of mediation is to resolve a jointly-owned problem by addressing a need of some immediacy.

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137. It is fairly common in the first hour of the facilitative process for the seasoned advocate to advise the assembly that he has years of experience in litigating matters of the type subject to the facilitation. See Robert H. Mnookian, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235, 242 (1993) (Professor Robert Mnookian would characterize this circumstance as a form of a "principal/agent problem," a misalignment of the incentives of the agent with the principal's interests).

138. See Christopher Honeyman, *Understanding Mediators*, in THE NEGOTIATOR'S FIELDBOOK: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR 581, 589 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006).

139. Cf. HILARY ASTOR & C.M. CHINKIN, DISPUTE RESOLUTION IN AUSTRALIA 99 (1992) (failure to engage real decision makers in the mediation talks may jeopardize the results).

140. See, e.g., ABA/BNA LAWYERS' MANUAL ON PROF'L CONDUCT §41:910 (2010) (cases discussing Ethical Rule 1.2, the lawyer's obligation to abide by client's decision whether to settle a matter).

141. The distinction between ownership and authorship is illustrated in DWIGHT GOLANN, MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR NEUTRALS AND ADVOCATES 240 (2009).

### B. *Engaging Parties in Trust Building*

Game theorists suggest that human nature causes people to adopt a risk-dominant strategy<sup>142</sup> rather than a payoff-dominant strategy where the ultimate reward drives the person to maximize that reward.<sup>143</sup> To optimize the reward, however, members of a camp—especially in multiparty disputes—must first change their beliefs about what their foes may attempt.<sup>144</sup> The whole challenge to cooperation requires: (1) a change in belief, (2) causing a group to change this belief in a coordinated manner, and (3) persuading those “new believers” to adhere immutably to their beliefs.<sup>145</sup>

Inevitably, some semblance of trust becomes imperative in the payoff-dominant strategy.<sup>146</sup> Genuine trust among adversaries is scarce.<sup>147</sup> In its place, game theorists advise using credible commitment as a totem.<sup>148</sup> Credible commitment requires each party to commit to a cooperative agreement in a fashion that engenders belief in the *commitment* even if there is inherent mistrust between the co-makers of the agreement.<sup>149</sup> Game theorists suggest two fundamental means by which a party may demonstrate credible commitment without underlying trust.<sup>150</sup> The parties in either instance will limit their options to defect from the cooperative agreement in an overt and transparent manner.<sup>151</sup> One possibility includes changing the reward structure so that it becomes too costly for parties to back out later.<sup>152</sup> Another method entails restructuring the party’s future options, thereby effectively eliminating alternatives so that agreed-upon cooperation cannot

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142. “Risk-dominant” describes a strategy designed to achieve a Nash equilibrium that implicates the least risk to the strategist. See FISHER, *supra* note 57, at 88. In risk-dominant strategies, the “winning” position is for parties to defect from or “cheat” under the agreement reached. See MCCAIN, *supra* note 57, at 51-52. A “dominant strategy” generally refers to one dominating all other strategies for a particular player in the game, because it is the best response to any strategy that the other player(s) may choose. *Id.*

143. See FISHER, *supra* note 57, at 88. Here, the Nash equilibrium and winning position implicate joint cooperation. *Id.*

144. See *id.* at 89.

145. *Id.*

146. *Id.* at 133.

147. See, e.g., AARON M. HOFFMAN, BUILDING TRUST: OVERCOMING SUSPICION IN INTERNATIONAL CONFLICT 2, 139 (James N. Rosenau & Russell Stone eds., 2006) (barriers to trusting relationships among rivals are high).

148. FISHER, *supra* note 57, at 136.

149. *Id.*

150. *Id.* at 136-37.

151. See *id.* at 7, 137, 196.

152. *Id.* at 137. For example, a party can place itself in a position where its reputation will be damaged. See *id.* at 137, 196.

[Vol. 12: 97, 2012]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

later be reneged.<sup>153</sup> Additionally, a party may also gain trust by showing altruism and generosity toward the foe without any accompanying expectation of reciprocity.<sup>154</sup> Game theorists hold that the circle of trust is best entered into by offering trust without expecting it in return.<sup>155</sup>

#### VI. FOURTH MEDIATOR TOOL: INCITES MAXIMUM OPTIONS FOR TRADES

Consensus-seeking negotiations tend to focus on identifying and addressing the vital, underlying needs of the stakeholders; whereas, the adversarial viewpoint tends to entrench parties in arguments and “position statements.”<sup>156</sup> This difference is reflected by the inclination of stakeholders to search for additional resources or new concepts for problem solving as opposed to focusing on the adversarial division of limited available resources.<sup>157</sup> Therefore, the stakeholders—who may consist of parties to an adjudicative action as well as “real parties in interest” immediately affected by an adjudicative result—will raise a number of related issues in search of a resolution.<sup>158</sup> That is a positive circumstance because, as game theory suggests, more issues increase the likelihood of greater satisfaction in outcomes due to the fact that more complementary trades are possible.<sup>159</sup> Complementary desires are met by the possibility of complementary trades, thereby promoting multiple solutions by which to share resources so as to meet the vital interests of the highest number of stakeholders.<sup>160</sup>

The successful mediator encourages stakeholders to articulate their complementary desires, identify linkages between what initially appears—prior to the application of the left-brain abductive skill sets—to be irrelevant

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153. *Id.* at 137, 196. *See also id.* at 140-42 (describing means of cutting off one’s “escape routes”).

154. *Id.* at 142.

155. *Id.* at 151. Thus, the risk–reward analysis is losing out to an untrustworthy foe versus gaining reciprocal trust. One’s vital interests can be compromised if trust is misplaced. *See* Yan Ki Bonnie Cheng, *Power and Trust in Negotiation and Decision-Making: A Critical Evaluation*, HARV. NEGOT. L. REV. (Sept. 1, 2009), available at <http://www.hnlr.org/?p=207>.

156. *See* Menkel-Meadow, *Consensus Building*, *supra* note 10, at 41-43.

157. *Id.* at 43; *see also* Cheng, *supra* note 155 (explaining that trust offers “integrative potential,” supporting collaborative efforts to “expand the pie”).

158. *See* Menkel-Meadow, *Consensus Building*, *supra* note 10, at 43.

159. *See id.* at 43.

160. This is an expression of George Homans’ theory of complementary needs. *See id.* at 43 (*citing* GEORGE C. HOMANS, *SOCIAL BEHAVIOR: ITS ELEMENTARY FORMS* (1974)).

and disconnected issues, and recognize mutual interdependence in the process of consensus building.<sup>161</sup> In this environment, creative solutions can surface as viable alternatives for concrete applications.<sup>162</sup> Professional baseball provides a helpful illustration of certain complementarities between organizations and how resources can be shared.<sup>163</sup>

A. *The Multiparty Trade: Engaging Outside Parties' Assets*

The essence of baseball player trading is the continual fluidity of the personnel marketplace.<sup>164</sup> As one baseball commentator notes—comparing the trading market in players to the securities market—adaptability of a team, seeking to improve its human capital, to the roiling marketplace is the key to satisfying outcomes.<sup>165</sup> Baseball trades involving three teams date back to the 1950s but became commonplace in the 1990s when the era of inflated player contracts and agonizing salary arbitration created an incentive for teams to jettison players with unaffordable contracts.<sup>166</sup> In order to soften the affect of absorbing contract costs, among other reasons, two teams desiring to exchange assets to improve overall player quality will involve a third team to help share the overall transaction costs.<sup>167</sup>

Initially, in order to improve the value of a team's roster, its vital interests and needs are identified by the team's management.<sup>168</sup> Of course, each team's core assets cannot be sacrificed, while the other team's assets alone may not meet the vital interests of the initiating team.<sup>169</sup> Consequently, the two teams that envision a bargain look for solutions by engaging a third team.<sup>170</sup> For instance, when one team attempts to offload a player's substantially high salary, in order for such a deal to be consummated, involvement of a third team, which has the ability to absorb the salary of the "expensive player," enables the initial two teams to

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161. See Menkel-Meadow, *Getting to "Let's Talk"*, *supra* note 80, at 849.

162. *Id.* at 849.

163. See *infra* Part VI.A–D.

164. See SCULLY, *supra* note 37, at 182-90.

165. See LEWIS, *supra* note 5, at 190-91, 212.

166. See SCOTT BARZILLA, *THE STATE OF BASEBALL MANAGEMENT: DECISION-MAKING IN THE BEST AND WORST TEAMS 1993-2003*, 31-32, 74-75, 169, 207, 231 (2004) (explaining that since free agency, many trades are informed less by value of new players added to the team than desire to "offload" salaries of nonessential players).

167. See *id.* at 31-32.

168. See SCULLY, *supra* note 37, at 182, 186.

169. See FISHER, *supra* note 57, at 184-87.

170. See *id.*

[Vol. 12: 97, 2012]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

complete their transaction by exchanging with team three less costly players and using their contracts as the medium of exchange.<sup>171</sup>

Looking for solutions outside the immediate parties' control may make solving a joint problem achievable by including third party participation.<sup>172</sup> This actually is a familiar approach in a variety of legal settlement postures.<sup>173</sup> In some personal injury cases, the individual plaintiff may be unable to reach a settlement with the defendant without his medical lienholders reducing their claims for payment.<sup>174</sup> All elements of a settlement may not reside exclusively in compensation from the direct adversary; thus, third parties may need to be included in the problem-solving conversation.<sup>175</sup> In the non-party-at-fault circumstances, instead of plaintiff and defendant sharing the binary thought-grounded conviction that they are each liable only to a particular degree, the parties accept that others may bear a certain degree of responsibility for which their assets may enable reaching a joint resolution.<sup>176</sup>

Reference to cash or other "standard" forms of compensation is at times short sighted. Returning to the aforementioned City versus office building owner mediation hypothetical,<sup>177</sup> the office building owner's property was rezoned with insufficient notice. While the insufficiency of the notice would ultimately prove to be of minimal substance—the City could have noticed the hearing properly and ultimately have taken identical rezoning action—the parties failed in their negotiations to address the possibility that the City could agree to certain zoning adjustments permitting the owner to use the building commercially without incurring a "spot-zoning" dilemma. Consider another illustration involving a surveyor who commits a substantial error in a subdivision survey. The owners discover that improvements of five neighbors within the six-lot subdivision are constructed across property boundaries, resulting in abundant, mutual encroachments. The binary thought process requires claims against the affected title insurance underwriters, the surveyor's errors and omissions carrier, the residential

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171. BARZILLA, *supra* note 166, at 31-32.

172. FISHER, *supra* note 57, at 184-87.

173. *Id.*

174. See Bill Daniels, *On Dealing with Lien Claimants*, CAALA LAS VEGAS CONVENTION SYLLABUS, Sept. 2001, available at <http://www.billdanielslaw.com/docs/On-Dealing-with-Lien-Claimants.htm>.

175. *Id.*

176. *Id.*

177. See *supra* pp. 98-99.

contractors, and the lot owners. In litigating fault and compensatory damages, the risk of destroying goodwill in the neighborhood via suits and countersuits for trespass, quiet title, damages for improvements' restoration, and loss of investment value looms large. The left-handed facilitator instead engages these parties, including the municipality's development branch, in a conversation to re-plot the subdivision so that neighbors can swap pieces of their lots, while maintaining roughly equal lot square footages; obtain the needed relief from the municipality, such as building setbacks' variances; and obtain appropriate reinsurance of title from the various title policy issuers—in the process resurrecting the neighborhood's development and emotional health. In a variety of circumstances, allowing many trades among multiple parties is an improvement over limiting the number of trades, a fact borne out in research<sup>178</sup> as well as in real life.<sup>179</sup>

*B. The Player to be Named Later and Other Deferred Compensation*

Major League Baseball teams often postpone the final terms of a player trade in order to better assess personnel needed for improvement—or what assets possessed by the other team are most marketable in order to improve those weakest positions—and to better judge the other team's talent before finalizing the deal.<sup>180</sup> In structuring a “player to be named later” exchange, teams generally agree on a list of five to ten players from which the team's final selection will be made.<sup>181</sup> Conventionally, players to be named later are too “new” to professional baseball to assess their talent at maturity.<sup>182</sup> Two rules govern player to be named later transactions: the deal must close within six months and the player must change leagues—which is why most players to be named later are minor leaguers.<sup>183</sup> In truth, the player to be named later, in the majority of cases, turns out to be of no special

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178. See, e.g., Christopher Bruce & Jeremy Clark, *The Efficiency of Direct Public Involvement in Environmental Policymaking: An Experimental Test*, 45 ENVTL. & RESOURCE ECON. 157, 172 (2010).

179. See Menkel-Meadow, *Getting to “Let's Talk”*, *supra* note 80, at 850 (describing political leaders engaging multiple parties in alternative solutions through multiparty consensus building processes).

180. See Rob Neyer, *Transactions Primer*, ESPN (Sept. 8, 1999), <http://sports.espn.go.com/espn/print?id=46397&type=story; What Is a Player to Be Named Later?>, SLATE.COM (Aug. 3, 2000, 5:12 PM), [http://www.slate.com/articles/news\\_and\\_politics/explainer/2000/08/what\\_is\\_a\\_player\\_to\\_be\\_named\\_later.html](http://www.slate.com/articles/news_and_politics/explainer/2000/08/what_is_a_player_to_be_named_later.html).

181. See *What Is a Player to Be Named Later?*, *supra* note 180; BRADBURY, *supra* note 106, at 155.

182. *Id.*

183. *Id.* at 154.

[Vol. 12: 97, 2012]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

consequence to the team “owed” the player.<sup>184</sup> Thus, the recipient usually designates the player to be named later for assignment<sup>185</sup> or places him on waivers<sup>186</sup> without ever optioning that player to its minor league team affiliate for development or seasoning.<sup>187</sup> This circumstance illustrates the reality that for any supposed “Pareto Improvement,” some “losers” are never fully compensated, thereby supporting the potential Pareto criterion underlying Kaldor-Hicks efficiency.<sup>188</sup> These admittedly are not idealized conditions leading to a Pareto-efficient outcome. Periodically, trades involving a player to be named later results in a “thrown in,” but ultimately contributing big-league player,<sup>189</sup> or these trades result in an in-lieu payment

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184. *Id.*

185. Meaning, the team has ten days to trade the player, outright the contract—and if not claimed by another team, enabling the player to become a free agent—or simply release the player from his contract. FRED CLAIRE & STEVE SPRINGER, FRED CLAIRE: MY 30 YEARS IN DODGER BLUE 189 (2004). See also LEWIS, *supra* note 5, at 214.

186. Waivers are a way to move players after the annual trading deadline about two months before the regular season ends. See RANDALL, *supra* note 120, at 25-26. When a player is placed on waivers, other teams in reverse order of the standings—first within the original team’s league, then the other league—have an opportunity to claim the waived player. *Id.* If no one asserts a claim, the player has “cleared waivers” and can be traded anywhere. *Id.* But if a claim is asserted, there are three possibilities: (1) the team placing the player on waivers can pull him off the list, no longer making him available to trade for that season; (2) the team can work out a trade and send the player to the team that “claimed” the player; or (3) the waiving team can let the claiming team take his services and his contract. *Id.*

187. The practice of “optioning” exists where a major league club sells a player’s contract—and the right to his services—to the minor league team, reserving an option to repurchase his contract at a stipulated price; however, there are limits on the number of times this opportunity can be elected by the major league team. Rob Neyer, *Transactions Primer*, ESPN (Sept. 8, 2007), <http://assets.espn.go.com/mlb/s/transactionsprimer.html>. If a player is on the forty-man roster and not the active twenty-five-man roster for any part of more than three seasons—in which he spent twenty or more total days of service in the minors—, he is out of options and may not be assigned to the minors without first clearing waivers. *Id.* However, if a player has less than five years of professional experience, he may be optioned to the minors in a fourth season without being subject to waivers. *Id.*

188. The notion of Kaldor-Hicks efficiency does not entail winners actually compensating losers. Jules L. Coleman, *Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law*, 68 CALIF. L. REV. 221, 239 (1980). Therefore, a redistribution of resources is said to be Kaldor-Hicks efficient if, and only if, it is a “possible” Pareto-superior redistribution of resources. *Id.* Guido Calabresi takes exception to the views of Kaldor-Hicks. Calabresi, *supra* note 115, at 1221-27.

189. Jeremy Bonderman, Scott Podsednik, Coco Crisp, Moisés Alou, Jason Schmidt, and David Ortiz are primary illustrations of players to be named later that “made good” in the major leagues. See, e.g., Kara Richey, *MLB Trade Deadline: David Ortiz and the Best Players to Be Named Later*, BLEACHER REPORT (Aug. 1, 2011), <http://bleacherreport.com/articles/786418-mlb-trades-david-ortiz-and-the-best-players-to-be-named-later>.

of cash to the team owed the “forthcoming” player, therefore, the convention survives despite the team owed the player rarely being appropriately compensated.<sup>190</sup>

The primary lesson to be derived from the player to be named later convention, is that some elements of a problem’s solution can be postponed thereby reaching settlement of sufficiently satisfying magnitude without knowing all final details of the accord. The broad outline of settlement, not the minutiae, is what matters, particularly when time is essential in reaching a joint solution in problem solving. The Five-Tool Mediator cannot allow insistence on a global understanding, where every last detail is cemented to the satisfaction of every stakeholder, to stymie agreement on a joint solution. The parties can agree later on complete specifics following the point where the exchange of remaining values is relatively inconsequential. In such a scenario, the circumstances resemble the clubs’ low mutual expectations for the future value of the player to be named later.<sup>191</sup>

### C. Designating a Player for Assignment

Designation for assignment is a way to release a player from the team’s future payroll.<sup>192</sup> Designation leaves open the possibility that another team will claim that player—absorbing his accompanying compensation—freeing the releasing team’s cash for its remaining financial obligations.<sup>193</sup> Maximization of trades requires the view that what appears initially merely as “salary offloading,” is in fact, an opportunity to achieve numerous other objectives of the assignment-designating team. These objectives include (1) reducing payroll to remain within salary cap regulations, and avoiding the “luxury tax” imposed on teams with payrolls well exceeding the balance of the league’s clubs; (2) addressing roster weaknesses by adding a player to increase its talent pool; (3) affording another franchise roster player an opportunity to play in the everyday lineup of a club, thereby maximizing his utility when that option may not have been available prior to the designated

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190. Conventional wisdom says that the later named player does not often have a productive major league career. See BRADBURY, *supra* note 106, at 155.

191. But see John H. Wade, *Crossing the Last Gap*, in THE NEGOTIATOR’S FIELDBOOK: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR 467, 467-74 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006). Wade reminds the reader that the devil resides within the finest of details, and that circumstances may render what ordinarily would be “parking lot issues” into core stumbling blocks to problem solving. *Id.*

192. This release is subject to Article IX of the Basic Agreement, which calls for formulaic termination pay for the year of the designation for assignment. See Basic Agreement, *supra* note 88, at art. IX.

193. LEWIS, *supra* note 5, at 214.

[Vol. 12: 97, 2012]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

player's assignment; and (4) achieving greater balance between a team's expenses against revenues, irrespective of salary cap limits.<sup>194</sup> A key lesson here for mediators is that one party's liabilities present opportunities—not necessarily as a limited-sum proposition but a win-win condition instead—and that essentially the greater the quantity of mediums introduced into the assets exchange process, the greater the likelihood that all circumstances improve. The mediator must emphasize to the stakeholders that asset value can be derived from one party's apparent liabilities, and that oppositional or complementary “trades” can satisfy a party's vital needs *in the process* of meeting the essential needs of another party, thereby expanding ways of sharing.<sup>195</sup>

#### D. *Split-Pool Revenue Sharing*

As Major League Baseball owners became aware of market forces accompanying the demographic structures of team locations, a split-pool revenue sharing system was devised to assist the smaller market teams.<sup>196</sup> Each franchise today is “taxed” 34% on the local revenue of the stadium-generated proceeds—such as gate revenue and concession sales—net of stadium expenses—and excluding non-stadium based income such as income generated by media broadcast contracts, which constitute about 40% of Major League Baseball's overall revenues.<sup>197</sup> These tax receipts are pooled and shared equally among all thirty teams, but the lower-revenue-generating teams—that is, lower than the league's net arithmetic mean—receive shares of a second pool that is funded by “richer” teams.<sup>198</sup> Economists acknowledge that revenue sharing has little if any effect on the distribution of talent within Major League Baseball.<sup>199</sup> Such sharing does increase the profits of small-market franchises, although its impact on the

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194. See Jeff Aberle, *MLB Transactions Part Three: Waivers and DFA*, PURPLEROW.COM (Feb. 19, 2009, 4:30 PM), <http://www.purplerow.com/2009/2/19/762532/mlb-transactions-part-three>.

195. See Menkel-Meadow, *Consensus Building*, *supra* note 10, at 43.

196. See ZIMBALIST, *BASEBALL ECONOMICS*, *supra* note 41, at 50.

197. See Staudohar, *supra* note 84, at 16-18.

198. See *id.* at 21.

199. Helmut Dietl, Markus Lang & Alexander Rathke, *The Combined Effect of Salary Restrictions and Revenue Sharing in Sports Leagues* 9-11 (Inst. for Strategy & Bus. Econ. Univ. of Zurich, Working Paper No. 102, 2010), available at [http://www.isu.uzh.ch/static/ISU\\_WPS/102\\_ISU\\_full.pdf](http://www.isu.uzh.ch/static/ISU_WPS/102_ISU_full.pdf). Presumably, the wealthier franchises simply “outbid” their poorer brothers for the talent of free agent players on the open market.

profits of large-market clubs is less clear.<sup>200</sup> Revenue sharing is an effective tool for cross-subsidization<sup>201</sup> as well as providing a vehicle for parity of player talent across Major League Baseball.<sup>202</sup> This illustration from Major League Baseball operations provide important lessons to mediators when communicating to parties, such as: (1) that survival of the stakeholders as a group in an interdependent system has greater value than optimal prosperity of fewer than all the stakeholders, and (2) that cross-subsidization is intuitively virtuous—in addition to having the benefit of enhancing trust creation—even if there is no competitive justification for subsidizing weaker stakeholders. The *de facto* receivership over the Los Angeles Dodgers franchise, impressed on club owner Frank McCourt by Commissioner Bud Selig on April 20, 2011, well illustrates this reality.<sup>203</sup>

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200. *Id.* at 5-7.

201. *Id.* at 25.

202. See Joel G. Maxcy, *Progressive Revenue Sharing in MLB: The Effect on Player Transfers* 13, 24-26 (N. Am. Ass'n of Sports Economists, Working Paper No. 07-28, 2007) available at [http://college.holycross.edu/RePEc/spe/Maxcy\\_Transfers2.pdf](http://college.holycross.edu/RePEc/spe/Maxcy_Transfers2.pdf) (concluding that low revenue-generating clubs react to increased sharing incentives to divest themselves of talent, so that no reinvestment of revenue sharing funds in purchasing current major league player talent occurs). Supporters of revenue sharing contend that the investment by the lower revenue-generating teams occurs through the franchises' minor league farm systems, producing more talent over a longer duration. *Id.* at 14.

203. "I have taken this action because of my deep concern regarding the finances and operations of the Dodgers to protect the best interests of the club," Selig announced on April 20, 2011, in explaining his decision to take over operation of the Dodgers. John M. Curtis, *LA Dodgers Driven into Receivership*, LA CITY BUZZ, Apr. 22, 2011, <http://www.examiner.com/city-buzz-in-los-angeles/la-dodgers-driven-into-receivership>. Appointing a trustee is unprecedented in Major League Baseball history. *Id.* By contrast, Commissioner Selig did not remove Texas Rangers' owner Tom Hicks before seeking new ownership for that franchise; instead, it eventually sold out of a bankruptcy to a new ownership group in 2010. *Id.* The Commissioner has such authority pursuant to the Major League Constitution art. II, § 3 (owner conduct "deemed by the Commissioner not to be in the best interests of Baseball" authorizes him to suspend or remove any owner or take such other actions as he deems appropriate) and art. VI, § 2 (the Clubs "on behalf of their owners . . . severally agree to be finally and unappealably bound by actions of the Commissioner . . . taken or reached pursuant to the provisions of this Constitution" and waive their rights of recourse to the courts). The Darwinian approach in this circumstance might have been for the other franchise owners to withhold support from the Commissioner's decision and to wait for the opportunity to cherry-pick players from the Dodgers through bankruptcy. This opportunity may be presented by the Dodgers' bankruptcy filed June 27, 2011. See *In re Los Angeles Dodgers LLC*, No. 11-12010 (Bankr. D. Del. 2011). Given the size of the Dodgers' fan base and its marketplace, together with revenue sharing, such an approach by the other owners would be shortsighted indeed.

[Vol. 12: 97, 2012]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

## VII. FIFTH MEDIATOR TOOL: CONSTRUCTS A RESONANT SOLUTION NARRATIVE

This mediator tool is not synonymous with “selling a settlement.” The capacity to construct a resonant narrative predates full knowledge of those terms under which a problem will be resolved. The result of proper construction of the narrative is that the parties’ representatives are able to envision themes leading to a settlement framework. If the parties can visualize a platform by which problem solving can occur, they will join the conversation in a contributing fashion. The following is an explanation of the key characteristics of the resonant settlement narrative.

First, the narrative must be plausible, facilitating the parties’ recognition of a rational solution<sup>204</sup> to a problem that is affordable, achievable, and transparent.<sup>205</sup> Second, the narrative must be coherent, describing to the parties a solution that is global and, as nearly as possible at the outset, comprehensive.<sup>206</sup> Disputants may identify pathways to achieve most of their vital interests without dashing the fundamental expectations of the other stakeholders.<sup>207</sup> Key ingredients of the coherent narrative are (1) a description of a process that is both mutually advantageous and leads to a fair outcome, such as the equitable division of resources and responsibilities, and (2) suggestions of a platform for how the resolution will be implemented and, throughout its continuation, enforced.<sup>208</sup>

Lastly, the narrative must describe the sustainable nature of the agreement by addressing the solution’s lasting nature, at least in its key elements—subject to some non-essential alterations following a threshold period beyond the facilitation process.<sup>209</sup> Sustainability may feature penalties to be assessed—or bonds to be forfeited—for defecting from the

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204. Strong, *supra* note 49, at 791-95. For mediators, this requires the imaginative reasoning process sometimes referred to as “abduction” (a term first coined by Charles Sanders Peirce), enabling perception of hypotheses that are not immediately apparent. *Id.* at 791-92. Here, scattered data is abductively, through the process of pattern recognition, grasped as a whole; thus, enabling subsequent data to be pieced together into the expanding composite picture. *Id.* at 793-95. This task, then, is performed by largely nonanalytical thought processes. *Id.* at 795.

205. *Id.* at 791-95.

206. Professor Strong summarizes the capacity of the right hemisphere to generate “the complete whole from incomplete or rearranged fragments.” *Id.* at 771.

207. *See*, FISHER, *supra* note 57, at 197.

208. *Id.*

209. *See* Mary Parker Follett, *Constructive Conflict*, in DYNAMIC ADMINISTRATION: THE COLLECTED PAPERS OF MARY PARKER FOLLETT 30, 36 (Henry C. Metcalf & L. Urwick eds., 1941).

agreement or incentives for ongoing cooperation,<sup>210</sup> appointing a third party to maintain the cooperative environment,<sup>211</sup> and ongoing encounters requiring future interactions between the former foes.<sup>212</sup>

The resonant narrative appeals to the subconscious mind of those who escaped a wounded childhood. In a healthy family structure, the parents—or other leaders—construct a narrative of the family unit in which each member gains a sense of belonging and comprehends his or her role, unthreatened by others within and outside the family circle.<sup>213</sup> In the same way that a resonant narrative within a family builds a child's self-confidence, a common vision of a solution to a joint problem, woven by the mediator, addresses the fundamental rational desires of each stakeholder.<sup>214</sup> While the successful settlement narrative requires the element of sustainability, this is quite different than the notion of finality.<sup>215</sup> There are two key distinctions between these elements. First, the sustainable narrative is not, when initially articulated by the mediator, sufficiently detailed to satisfy any longing for a comprehensive solution that ends the need for any decision making.<sup>216</sup> As used here, sustainability does not bypass hard work necessary to achieve final settlement.<sup>217</sup> An effective narrative stirs the imaginations of the stakeholders' representatives, enabling genuine, good-faith participation in bargaining.<sup>218</sup> This creative force, giving momentum to the parties'

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210. See, e.g., FISHER, *supra* note 57, at 197 (explaining that using side payments, such as money, social, or emotional awards can help sustain your coalition).

211. *Id.* at 184-85. These elements may include the parties' agreement to trust the enforcement authority of the third party, allowing the third party to hold a performance bond or to dispense liquidated damages to compensate for defection from a portion of the agreement. *Id.* at 184-85, 196. *But see id.* (explaining that benevolent authority, relying on external authority, can be ineffective because of third parties own self-interest and craze for power).

212. Game theorists conclude that obligations to interact in the future nearly always enhance cooperation under an agreement. *Id.* at 196.

213. Jennifer G. Bohanek, Kelly A. Marin, Robyn Fivush & Marshall P. Duke, *Family Narrative Interaction and Children's Sense of Self*, 45 FAM. PROCESS 39, 48 (2006) (explaining that because children's perspectives are validated and integrated in this environment, their self-esteem is high).

214. See JOHN WINSLADE & GERALD MONK, PRACTICING NARRATIVE MEDIATION: LOOSENING THE GRIP OF CONFLICT 10, 18, 146-48 (2008).

215. Follett, *supra* note 209, at 32 (discussing that a step of integration is necessary, see, e.g., *id.*, a compromise doesn't really resolve the problem; rather, an integrated solution "means that a solution has been found in which both desires have a place that neither side had to sacrifice anything").

216. *Id.* at 41 (describing integration as a long process in which there are many steps such as uncovering the real conflict and identifying the demands of both sides in order to break them down).

217. *Id.* at 36 (concluding that only full integration brings about sustainability to conflicts).

218. Professor Strong notes that the right brain plays a vital role both in receiving and conveying information in the form of a narrative and in the creative generation of hypotheses—"what if we"—in the legal problem-solving process. Strong, *supra* note 49, at 775. Here, the

[Vol. 12: 97, 2012]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

“invention,” is a foundation principle of an integrative solution to a joint problem first espoused by Mary Parker Follett in the 1930s.<sup>219</sup> Second, any comprehensive solution to a complex, multiparty conflict likely will require “re-trading” at a later juncture—without implying treachery on the part of the mediator or any stakeholder.<sup>220</sup>

Few immutable solutions persist in the fluid environment of modern life, outside forces which have little reason—if conscious—to endorse permanence will affect the initial settlement scenario.<sup>221</sup> Re-envisioning the global solution may be advantageous to all stakeholders, even *before* certain elements are implemented.<sup>222</sup> However, this circumstance does not indicate a failure to anticipate future events—some sudden, others unpredictable.<sup>223</sup> If the mediator engages the parties and their counsel in problem solving, the stakeholders’ representatives (in right hemispheric-dominant mode) will

essential skill is that of weaving seemingly unrelated ingredients underlying a solution into coherence, or a meaningful metaphoric expression. MCGILCHRIST, *THE DIVIDED BRAIN*, *supra* note 14, at 51. The author describes a metaphor’s purpose as “to being together the whole of one thing with the whole of another, so that each is looked at in a different light.” *Id.* at 117.

219. Follett, *supra* note 209, at 33 (“Integration involves invention, and the clever thing is to recognize this, and not to let one’s thinking stay within the boundaries of two alternatives which are mutually exclusive.”). Follett refers here, of course, to eschewing the binary code world of “off” and “on” alternatives in which the left hemisphere selects the single “best” solution that fits what it already knows and latches onto it. See MCGILCHRIST, *THE DIVIDED BRAIN*, *supra* note 14, at 41; McGilchrist, *Reciprocal Organization*, *supra* note 55, at 324.

220. Professor Menkel-Meadow observes that the increasing use of incremental, flexible, and contingent settlements in complex controversies which recognize that tentative solutions, following testing and evaluation, may require renegotiation in light of the new information or changed circumstances generated by the tests or evaluation over time. Menkel-Meadow, *Getting to “Let’s Talk”*, *supra* note 80, at 843. Here, the left hemisphere is less efficient, as assumptions must be revised or new material must be distinguished from older information; in contrast, the right hemisphere keeps possible solutions “live” while alternative courses of action are investigated. See MCGILCHRIST, *THE DIVIDED BRAIN*, *supra* note 14, at 41; McGilchrist, *Reciprocal Organization*, *supra* note 55, at 324. McGilchrist notes that the right hemisphere is attuned to apprehending anything new and is more capable of a “frame shift,” while the left hemisphere functions less efficiently when initial assumptions must be revised. MCGILCHRIST, *THE DIVIDED BRAIN*, *supra* note 14, at 40.

221. Menkel-Meadow, *Getting to “Let’s Talk”*, *supra* note 80, at 843.

222. FISHER, *supra* note 57, at 197 (in discussing tips for cooperation, the author describes the benefits of global solutions).

223. See, *c.f.*, Marcus Baram, *CIA’s Mideast Surprise Recalls History of Intelligence Failures*, HUFFINGTON POST, Feb. 11, 2011, 6:35 PM, [http://www.huffingtonpost.com/2011/02/11/cias-mideast-surprise-history-of-failures\\_n\\_822183.html#s239132&title=Iranian\\_Revolution\\_1979](http://www.huffingtonpost.com/2011/02/11/cias-mideast-surprise-history-of-failures_n_822183.html#s239132&title=Iranian_Revolution_1979). Few if any outsiders anticipated Tunisia or Egypt’s use of wireless technology in the spring of 2011 to map out nonviolent revolutions prior to their commencements. *Id.*

adapt their respective perceptions of vital interests to the narrative structure.<sup>224</sup>

### VIII. CONCLUSION

One old bromide describes the mediation process as the adversaries' last, best opportunity to dictate internally-engineered outcomes of their choosing.<sup>225</sup> But when the realm of solution building encompasses no more than the conventional spectrum of resolution possibilities, parties naturally gravitate toward binary thought processes.<sup>226</sup> Therefore, in a fault apportionment dispute where each party is convinced that he is no more than 30% at fault for the harm caused, each may grudgingly yield a few "blame percentage points" to avoid diverting resources to adjudication as well as the risk of encountering imperfect fact finders. Still, each party essentially fixates upon an upper limit to his responsibility.<sup>227</sup> A joint resolution here may turn on each party's acknowledging that fault apportionment does relatively little to resolve their mutual problems.<sup>228</sup>

The Five-Tool Mediator is not content to relay mechanical or crudely-constructed *ad hoc* proposals for "incrementally-improved" agreements between adversaries in a shuttle-diplomacy style.<sup>229</sup> Instead, he is an agitator, teasing out declarations of the vital interests of each disputant stakeholder, creating an environment where maximum trades are possible, and selecting bold goals that are optimal, albeit seemingly infeasible, at the time they are devised.<sup>230</sup> The Five-Tool Mediator silences voices decrying progress in deal making and encourages the forward movement of communications toward break-through collaboration. She also strives to

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224. McGilchrist notes that the right hemisphere specializes in accepting and processing uncertainty and ambiguity, having affinity for what is new, unknown, uncertain, and unbounded. See MCGILCHRIST, *THE DIVIDED BRAIN*, *supra* note 14, at 40-41; McGilchrist, *Reciprocal Organization*, *supra* note 55, at 327.

225. Hensler, *supra* note 5, at 182, 189-90.

226. MCGILCHRIST, *THE DIVIDED BRAIN*, *supra* note 14, at 40, 139 (explaining that the right hemisphere has more capability to "frame-shift" and, like computers, the brain recognizes "two binary codes of on and off").

227. This illustrates left-brain dominance revealing its relative inflexibility. McGilchrist notes that flexibility entails disengaging from focused attention—which persons with left hemispheric dominance have difficulty doing—because familiarity causes the left brain to focus more intently upon identification by parts in its attempt to know the whole, grasping what it already has broken apart, categorized, and prioritized. MCGILCHRIST, *THE DIVIDED BRAIN*, *supra* note 14, at 40, 44-45, 49-51.

228. *Id.* at 40, 44-45, 49-51.

229. See Sestanovich, *supra* note 77, at 21.

230. Richard Holbrooke summarized his all-out strategy for achieving agreement this way: "Better a high benchmark than a weak compromise." *Id.* at 20.

[Vol. 12: 97, 2012]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

persuade each foe to trust the others or, minimally, to demonstrate credible commitment to engender belief in the possibility of joint structuring and adhering to an agreement.<sup>231</sup> Ultimately, the Five-Tool Mediator constructs a resonant narrative of problem solving to obtain the parties' buy-in to a global and fair solution.<sup>232</sup> This solution discourages defection strategies through a regimen of sanctions or rewards, including social, emotional, and financial rewards.<sup>233</sup>

The Five-Tool Mediator uses the right-hemispheric specialization in stored "real world" perspectives, viewing each possibility for settlement in context within its surroundings.<sup>234</sup> He also urges similar—although not exclusive—non-strictly analytical faculties to be used by the adversaries, enabling them to see the problem's resolution by joining fragmented data into a unified composite.<sup>235</sup> The Five-Tool Mediator adopts a set of attitudes designed to maximize the possibility for the creation of "better than" outcome solutions to complex disputes.<sup>236</sup> She is also able to recognize that the dispute, at its root, is a shared problem that requires mutual study and conversation about creative solution building involving equitable sharing of finite resources.<sup>237</sup> Disputants need counsel from such expert facilitators for successful conciliatory processes in contentious, complex decision-making scenarios, particularly during an impasse in negotiations.<sup>238</sup> The Five-Tool Mediator will dismantle blockades caused either by a party's habit of binary thought or his resolute refusal to engage in meaningful problem-solving processes, while weaving vital interests of each party into a narrative luring the imaginative faculties of the brain's right hemisphere. Concurrently, applying game theory in evaluating rational settlement postures—in Len Fisher's words, "imposing logical discipline on the stories we tell"—will engage the mediator and the parties in a quantitative, left brain exercise complimenting the scenario-planning right brain effort.<sup>239</sup>

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231. FISHER, *supra* note 57, at 184-85.

232. *Id.* at 197.

233. *Id.*

234. MCGILCHRIST, THE DIVIDED BRAIN, *supra* note 14, at 49; McGilchrist, *Reciprocal Organization*, *supra* note 55, at 325-26.

235. MCGILCHRIST, THE DIVIDED BRAIN, *supra* note 14, at 49; McGilchrist, *Reciprocal Organization*, *supra* note 55, at 325-26.

236. Hensler, *supra* note 5, at 182, 189-90.

237. Follett, *supra* note 209, at 33.

238. Hensler, *supra* note 5, at 182, 189-90.

239. See JOHN C. SHAW, CORPORATE GOVERNANCE AND RISK: A SYSTEMS APPROACH 107 (2003).

