

MEDIATION THROUGH UNDERSTANDING

A co-production of The Center for Mediation in Law
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(COMMENTARY)

While conflict is inevitable, the efficient and fair resolution of legal disputes is not. Too often relationships are irreparable damaged and parties needlessly spend vast sums on the litigation process.

Hello, my name is Robert Mnookin. Together with colleagues first at the Stanford Center on Conflict and Negotiation and now at the Program on Negotiation at the Harvard Law School, I have studied the barriers -- strategic, psychological and institutional -- that often stand in the way of the resolution of conflict. I have been especially interested in how mediators can help parties overcome these barriers and successfully resolve their disputes.

During the next hour you will observe Gary Friedman, an experienced mediator, demonstrate how he works from a particular model of mediation that he, Jack Himmelstein and I, have developed in our work together as teachers and practitioners over a number of years. It is useful at the outset to locate this model in the broader context of the world of mediation.

While there is general agreement among practitioners and scholars that a mediator's role is to facilitate negotiation, and that as a mediator a neutral must lack the power to impose a resolution, there are a number of competing models of mediation.

First, this model emphasizes that mediation should be a voluntary, non-coercive process where the parties are ultimately responsible for whether and how the conflict is resolved. Throughout this mediation, you should observe the various ways Gary makes it clear to the parties that it is their responsibility -- not the mediator's alone -- to search for a resolution. As a corollary, Gary's stance towards the parties is facilitative not manipulative or coercive.

Second, this model assumes that in legal disputes the law is inescapably relevant. But the law need not be the exclusive or even primary basis for a mediated resolution. Parties bargain in the law's shadow because one or both parties can pursue the alternative of litigation. If the dispute is not resolved by agreement, a judge or arbitrator can impose a resolution. How can one compare options generated by the mediation process with this litigation alternative absent some understanding of the opportunities and risks of continued litigation. On the other hand, a great advantage of mediation is that parties can often shape a resolution that reflects their economic and personal interests and needs far better than an adjudicated outcome.

Third, this model assumes that by working together with the parties and their counsel -- and avoiding separate meetings and shuttle diplomacy where the mediator alone has information from both sides -- mediation offers each party the best opportunity to deepen their own understanding, of both their own perspective and

interests, and those of the other side. Embracing conflict is often the best opportunity to create value.

GARY FRIEDMAN
(MEDIATOR):

Thanks for coming here this morning to meet with me to see whether mediation is going to be the way...

JACK HIMMELSTEIN
(COMMENTARY):

This mediation brings together Jackie who until recently served as Artistic Director for DANCE INNOVATION, or "DI," and Mike, DI's Executive Director and Chairman of the Board who dismissed Jackie midway through her three year contract. DI is a well-known modern dance company whose mission is to support the work of new choreographers. Jackie's job was to guide that mission.

In her first year, Jackie created two of her own pieces, which were well received. She was nearing completion on a third major work, Ensemble, which was to be the centerpiece of DI's upcoming season when that piece became instead the focal point of a conflict between Mike and Jackie that culminated in her dismissal.

Jackie consulted Conrad, a lawyer who represents artists. Conrad sent a letter to DI's lawyer, Joan, saying that since Ensemble was not yet complete, it belonged to the artist and that he would go to court to prevent the dance from being performed if DI planned to complete and put on the work without Jackie.

CONTRACTING

CONRAD

Speaking for Jackie, she has some interest in doing this. The truth of the matter, though, is she's been taken advantage of. And she's come to me in a bind. She can do what most artists would do, which is sort of go quietly, or she can stick up for herself, and she can say, no, it's wrong. You can't just use my services and then steal my work and take advantage of me in that way, counting on the fact that it's the ethos in this profession to keep quiet. That kind of extortion, frankly, is not the kind of thing that she's going to settle for.

GARY

So if I understand you correctly, what you're saying is that she comes

here with some intention to see if she can work things out and that she has a kind of natural inclination, and has in the past found herself going along with things, and that that represents a concern that you have in terms of this process.

JOAN The fact of the matter is, Jackie has done anything but sort of go along with things. We've had trouble with her fiscal responsibility. We've had trouble with some of her artistic work. There have been some works she created that have been successful for the company, but there have been other works that have not. And I think it's very important that Jackie understand that if we do resolve this one way or the other, and that one way happens to be in court, it will be very expensive, your reputation will be at issue. The company will not hold back, if that's the way we choose to go. The company, at the same time, appreciates that there's some uncertainty in the judicial process.

GARY So you come here, Joan, with some concerns as well. I hear a desire on your part to see if you can work things out on some basis that will not require having to litigate. You're also prepared to litigate if it's necessary. Is that correct?

JOAN That's correct.

GARY The goal here, really, is to see if I can help you work together to make decisions, based on what's important to you, that will leave both sides in a position that's better off than you would have been if you were to proceed with litigation. I wouldn't act as the judge. The idea is that really the two of you are the judges. And that if we come to something you both feel is right, then we've done our job, and if we don't, the you're hopefully no worse off, other than the time and money that you've put into...invested in this process.

MIKE I'm certainly not trying to tell you your business, but I don't understand how the five of us sitting in a room with Conrad making really rather inflammatory comments is going to further any understanding. The company acted in good faith in the discharge of what we thought were our obligations.

JACKIE Well, that's up for dispute.

MIKE It may be up for dispute, but I'd wonder if it wouldn't be more helpful if we met separately with you, and if you want to convey our views, or convey their views, fine. But I really don't see that this face-to-face meeting is going to advance anything.

GARY Mm hmm.

JACKIE

I want to hear what you're going to say. And I want to hear what you're going to say. Because already she said something that isn't true, which is that some of my works are not well received. The works that were not well received were the works by the newer choreographers. And I kept telling you, you know it's hard to find good young choreographers whose works are going to be up to the level that I thought this company was interested in.

GARY

Well, I'm hearing two different things here. One is, it sounds like you're upset by the way Conrad characterized the actions of the company.

MIKE

I don't see how I could have been other than upset, and I can't understand how he could have thought other than what he was saying was upsetting.

GARY

I do think that that's a normal part of the mediation process. The question is, given that upset and the fact that you have your differences, whether or not meeting in the same room is going to be a productive way of dealing with those differences. And I'm hearing from you that you want to be here to know not just what's said by your side but what's said by the other.

COMMENTARY

Gary started the mediation seeking to assure that Mike and Jackie become full, active and responsible participants in the process. In the approach to mediation we have been developing through the Center for Mediation in Law, we believe that it is the parties, rather than the professionals, who ultimately have the best understanding of what underlies their dispute, although the intensity of the conflict can obscure their view. It is the parties' conflict; and they hold the key to reaching a solution that best serves them both.

Gary is also seeking actively to understand each participant, and demonstrate that he has understood them - what we call "completing the loop of understanding," or simply "looping." Done correctly, it helps bring clarity about what is being said and meant. But it also brings the power of understanding to bear on the conflict. For us, increasing understanding and responsibility while reducing coercion and pressure is at the core of mediation.

CONRAD

They lured her away from a secure job, a better-paying job, and now half

way through her contract put her out, no more income coming in, and on top of that they're trying to steal her works. Now they're going to either have to make...

JOAN Nobody's trying to steal her works.

MIKE Are we trying to reach an agreement, or are we posturing?

CONRAD They're either going to have to make completely enormous changes in their position or this isn't going to go anywhere. They're only going to make those changes if they understand what they're up against and what they've done.

JOAN We understand what we're up against.

CONRAD Essentially what we have here is a company run by a dilettante that has been run into the ground by this man. They'll be exposing themselves in court and in the public to the seamy side of what they've done. Because that's the only thing my client now is left. She has nothing to lose. They've taken her services, they've taken her work, and they're trying to take her reputation.

JOAN It's great that you're putting on this fantastic show for your client, Conrad, but you're living in a fantasy world in terms of the law. I mean, the reality is, she signed a contract that clearly states that the works that are produced during her employment with my client belong to my client. That contract law is clear, as is the work-for-hire law that's out there.

GARY The fact that you're prepared and that you're prepared to litigate, I think, is a strength of the mediation process, because it will really direct us toward trying to find solutions that don't leave either of you worse off than you would have been if you went to court. In order to do that, we're going to look not just at the legal reality here. And that there are other things that are of significance to both the company and to you and to you that may be of a more personal nature and certainly are of a business nature.

COMMENTARY

In the mediation of any dispute where there is the potential for litigation, it is useful to think about two different sorts of conversations that can take place. Some mediators try to focus exclusively on the law and attempt to settle cases simply by helping the parties have sufficiently convergent expectations of what is likely to happen in court. Other

mediators try to avoid the law all together, and instead search for agreements that build exclusively on the parties' interests.

As you will see in the scenes to follow, this mediation encompasses both kinds of conversations and accepts that there may often be a tension between them.

JACKIE What you referred to as the more personal dimension or personal issues are probably things that wouldn't really get heard in court. And I feel like I have a more authentic and present voice in a situation like this.

GARY And how about you?

MIKE I have to be frank with you that I go into this with some, I won't say reservation, I'll commit to, in good faith, try it, but I've got to continually be testing, you know, what makes sense for this dance company and what makes sense for me personally.

GARY Are you willing to say what the reservation is about you personally?

MIKE Look, I work as the Chairman of the Board of this dance company, because of my personal commitment to the arts, because of the commitment to the arts that my family has had for some time. This is not my livelihood. I've made some sacrifices, and it seems to me at this point that, you know, this is proof that no good deed goes unpunished. If we can have a rational discussion and try and work things out, that's fine. If we can't, and meeting separately would be more productive, I'd like to try that.

GARY Since ultimately it's going to be the two of you, Mike and Jackie, that are going to have to make, ultimately, the decision about whether or not we create a solution here that you're willing to get behind. I want the two of you to have as full an understanding of all the dimensions of the problem as we can possibly provide for you. And my sense is that you'll have that if you can be present for all of the discussions, and we can make those discussions productive.

COMMENTARY

These are the first agreements the participants make together and, if reached in a genuine way, can help maximize the parties' shared understanding of, commitment to and responsibility for the mediation.

JOAN

I don't want this process to be used in a way that would allow Conrad to get information he either otherwise wouldn't be entitled to in court or just to, you know, harass my client.

GARY

And your view about this?

CONRAD

For us to be able to decide here and now what makes sense to do in a mediation, we'll have to be able to evaluate the strength of your claims. And to do that we'd need to see some documentation.

GARY

I want you to have everything that's legally relevant. And I think you each need to be sure the other side has everything that's legally relevant. Why? Because if we're going to be in the position where we're going to really be asking you to assess what the legal risks and outcomes would likely be, we're not going to be able to do that job right without having that. I guess I just want to be sure that in that mix that you consider the risk of not being open. And in the litigation atmosphere, the less information you give, the better off you are. In this situation, in many ways, the more information you give, the fuller basis we have to see what underlies this dispute.

EDUCATING THE PARTIES ABOUT THE LAW

GARY Are you ready to...for each of you to describe your legal positions so that your clients and I can understand those?

CONRAD Let's understand that the basics here are the creator of the work owns the work. The exceptions under the copyright act are works for hire. Work for hire can only exist in its completed state. The act doesn't contemplate unfinished work. Whereas here you have a work that was never fully completed you can't claim ownership to that.

JOAN Jackie substantially completed that work or whatever work was completed is a work that which she prepared during the course of her employment with the company. She used company dancers, etc. And it is the company's position that that also clearly belongs to the company.

COMMENTARY

A critical role the mediator can play is to help the parties deepen their understanding of the risks and uncertainties of the litigation process.

GARY Just for the moment, assume the unthinkable has happened. You've gone to court and you've lost the case. And now you have to explain to your clients all the reasons why that could have happened. And if you are willing, I would like each of you to kind of flesh out the risk part of this so your clients have an appreciation of that. Is that something you would be willing to do?

JOAN One reason is that judges aren't always right. And it may be that this judge just doesn't quite see it our way.

COMMENTARY

While lawyers are often initially reluctant to acknowledge any weakness in their case, with the mediator's help, they can take this task seriously.

CONRAD

And it is possible that a judge would want to see this in the narrowest possible legal terms without regard to the equities. That can happen.

JOAN

A judge may be persuaded to...in a sense put the law aside not withstanding that we have the better legal argument and feel that he wanted to have a certain result come out and that result would be to support the artist in this instance.

COMMENTARY

An assessment of litigation also requires making sure the parties understand the practical consequences of going to court.

CONRAD

I think it is important as you and I have discussed to know that the bringing of the case was something that was important to you. And that even if they win and we quote "lose" you will have helped your reputation in the community as you go forward by showing your pride in your work and your pride in the integrity of dancers and choreographers in the community by trying to stand up for the control that you believe choreographers ought to exercise over their work.

JOAN

You've given her a completely false sense of what's going to happen at the end day.

JACKIE

I'm not worried if the court says this piece can not be put on. That is exactly what I want to have happen if I don't finish the piece. I don't want to see that piece performed in its present state. It is not completed. And I certainly don't want to see it performed with somebody else's ending on it.

GARY

So it's really a high priority for you to know that that piece would never see the light of day without your being able to (JACKIE Right.) contribute to the finishing of it.

JACKIE

Right.

MIKE

And I think exactly the problem we have is that Jackie is much more concerned about her piece completed the way she wants it when she wants it than she is with acting as the artistic director of this company or of taking any concern to the needs of this company.

CONRAD

And it is interesting to me because what I see happening here is you got someone from the business community who is trying to transpose what maybe business norms into an artistic setting. I don't think Mike understands that what he is essentially setting in motion is a public display of a company in turmoil. Why would other choreographers or dancers or artistic directors want to be associated with you? Why would funders want to give money to you? Why would potential board members want to be associated with what will be ultimately an unsuccessful and an unpleasant venture?

MIKE

That the company is in turmoil is something that we've been aware of and in fact the dance community has been aware of. We had hoped that Jackie's coming as the artistic director would in fact reduce that turmoil. In fact she has contributed to our turmoil. She has, in my view, wasted the assets of the company. I am concerned about the presentation of works of a variety of choreographers. It was for that reason that we retained her. We were not retaining her to be a funding source for the development of her piece however marvelous it may be.

CONRAD

But I think your ignorance of the artistic norms in this community are going to bring the company down pure and simple.

MIKE

And if the company is brought down it will be your client and to some extent your attitude which would have contributed very significantly to it. And I don't think that that will stand your client in good stead in the dance community.

CONRAD

I didn't fire my client you did. I didn't seek ownership of her rights you did and I think that's going to hurt you.

MIKE

I would have been derelict in my duty had I not fired your client.

GARY

I'd like to make an observation because I can see how upset you each are with what the other is saying. While there are some advantages to both sides in terms of being able to proceed in court if you win there are also some costs here to both sides no matter who wins. If you do go to court one of the consequences is clearly going to be that a division between the two of you will be escalated even further than it is already and that's going to have some consequences for both sides that I think you just need to take into account.

JOAN

That's why we are here.

THE MEDIATOR UNDERSTANDING THE PARTIES

COMMENTARY

Having explored the legal reality, Gary now turns to the "second conversation"—gaining understanding about the business and personal concerns at stake. Where the lawyers were foreground in the first conversation, here the parties are the experts. Indeed, you will see that Gary has actually invited Mike and Jackie to change places with their lawyers so that they are sitting nearer to him, and he can give them his full attention. His goal is to support each of them in articulating what they view as important not so much in terms of their positions but rather what underlies their dispute at a deeper level.

As we return to this next stage, Gary seeks to be sure that there is agreement about this task and that the parties are motivated to assert what they really care about.

GARY Does this make sense for you to do?

MIKE Yes I mean I think this is the part that is frankly beginning to make the most sense.

GARY Mhm mmm. How so?

MIKE In the sense that if we are going to have any kind of resolution of the conflict without litigation the issue is not the lawyers going to war but Jackie and me, Jackie and the company, finding some way to work together, some basis for settlement. And I don't see that happening except for the two of us talking.

GARY From my perspective, the more understanding you each have of what is important to you and to each other can really be critical to our finding a kind of solution that is going to be more individually satisfying than a kind of more objective or cookie cutter solution.

GARY And Jackie where are you with this now? Does it still make sense for you to proceed?

JACKIE Yeah, I started out with a very different feeling than what happened along the line. And my, one of my interests is trying to figure out how that happened.

GARY Would you prefer to go first?

JACKIE I don't think it matters to me.

GARY Mm hmm. How about you Mike?

MIKE Okay. Dance Innovation is a smaller dance company here in the city. Formed a number of years ago and kind of our first choreographer and artistic director was Peter George. We were really....

COMMENTARY

Mike then recounts the bind he was in as more of the company's time and resources went into the production of Ensemble, to the neglect, as he saw it, of the company's mission to support new choreographers.

Much has been said and written about mediator neutrality - the importance of maintaining objectivity and not being on one side or the other. Our approach to mediation seeks to develop a sense of a subjective "positive neutrality" where the mediator works hard to be on both sides. Having sought to gain an empathic understanding of what is most significant to Mike, the challenge for Gary is to be fully there for Jackie whose view is very different.

JACKIE On top of this Mike and the board ask me to do something that I did not understand to be in the original agreement which was to go out and do fund raising. You know, I understood the concerns about saving money and I already knew there were tensions between Mike and me. The thing that gets me is...you know...that...that Mike is turning this into that I just wanted to promote myself.

GARY What really cuts to the quick here for you is to feel accused by Mike and or the board of not wanting to support the development of other choreographers because that was and sounds like still is so close to your heart.

JACKIE Right. The bottom line, to use a business term, in dance or any other art is the quality of the work. If you don't have the quality of the work, the funding, the audience, is not going to last.

MIKE If there isn't a company, if we can't preserve the financial viability of the company, there will be no dance. Jackie has to some extent turned the matter around. Part of the difference between the artistic director and a choreographer is the ability to bring that added dimension, the ability to balance the search for other choreographers, the need for funds, and the

artistic vision. And I am sorry that, I am truly sorry, that Jackie feels so emotionally wounded, but the fact is whatever her inner feelings, her performance was not responsive to the mandate that we had.

GARY It was because Jackie was so ...um... working so hard on Ensemble was the very problem that you felt was taking away from the rest of the mandate that was so upsetting to you and sounds like also to the board.

MIKE Yes. Upsetting may be the wrong term because it puts it on the wrong level.

GARY The reason I said upsetting is you seem upset when you just said all that.

MIKE Then maybe upsetting.

GARY I mean if it doesn't fit, tell me but it just sounds like this is hard for you too.

MIKE Well of course it's hard, I recognize it's hard for Jackie. It's hard for the members of the board, it's hard for me. Were this not hard we wouldn't be here. But we are here and we do have a dispute.

GARY Yeah we are here, there is a dispute, there are differences between you and I find it helpful you're acknowledging the level in which it is personally hard for you, too.

COMMENTARY

By inviting Mike to express how the dispute impacts him personally, Gary seeks to encourage authentic communication about all aspects of the experience of the conflict that have meaning for the parties -- business and personal, financial and relational, thoughts and feelings.

Having understood both Mike and Jackie, Gary now has what we call the "mediative perspective" - where he can hold both views as valid without having to choose between them. Jackie and Mike have deepened their understanding of their own views of what is important for them underlying the dispute and likely feel understood and supported by the mediator.

There is now the opportunity to see if the parties are motivated to try to understand each other. When parties are willing, this next step makes it possible that mediation not only supports the autonomy of each party but also honors their connection.

HELPING THE PARTIES UNDERSTAND EACH OTHER

GARY I mean, you both have done a really terrific job of expressing your different points of view. And as I sit here listening to both sides it doesn't feel to me at all as if either side, what either of you are saying, cancels out the other. I guess I wonder whether it would be useful to you for you each to know how to what extent you are understood by the other side, the other person. And whether or not that's an effort that you would be willing to make each of you to kind of demonstrate what you understand. Not that you agree with the other side not that that truth is the only truth but that it is that person's perspective whether that is something you find yourselves willing to do.

MIKE But I have to tell you I am not entirely certain what you just said. I can understand but not agree. That sounds a little bit like, am I capable of parroting back even if it is ashes in my mouth?

GARY No, that is not what I mean. I'm really trying to find some ground here for agreement. And that will come out of as much understanding as we can create here in the room, each of your own selves but also of each other, that will help us when we start to try to figure out what is going to underlie any solutions that could be mutually acceptable. Is that something that you are interested in doing?

JACKIE I'll give it a try.

MIKE Yeah...

GARY Mm hmm. Tell me why this would be something you would be interested in doing.

MIKE I negotiate all the time. And you always, in a negotiation, try and understand what the other person needs.

GARY Yeah it is a negotiation. What I think I might be saying that might be little different is to take the step of really trying to demonstrate your understanding of what is really important to the other person in terms of how they see this and to do that in a way that you're not just doing that with your head but you're doing it with your heart. And that's something that if you are willing to do, in my experience, can change the way we're working together. Sounds like something might have struck a chord with you?

JACKIE Well...no...it is when you said working from the heart.

GARY That is something that you want to be doing...

JACKIE I do... I mean I do. The thing that intrigued me in particular about what you just said was the idea that you can try to really understand what the other person's experience feels like or what the situation looks like to them. That that's possible without giving up or denying or otherwise altering how I feel.

GARY Sounds like that was liberating for you that possibility.

JACKIE Right.

GARY That is what I think the real possibility of mediation is, to not have to choose between one right and one wrong

MIKE I really am a very different person than Jackie. She appears to be able to respond at a level that frankly I really just don't understand let alone relate to. I will certainly work with you but I'm not sure we are going to be the same. And I hope that you don't take that as something less than either quality or effort.

GARY And what is that like for you to hear that?

JACKIE I feel I sort of identify with Mike if he is saying he hopes that I don't...think less of him or something if he doesn't burst into tears, something like that. And I don't.

GARY So it sounds like there is a willingness on both your parts and agreement to do this. Is that right? [THEY AGREE] The way I'd like to suggest we do it is first one of you starts by saying what you understand of what the other person has said before and that we then use the other person to help correct it for any gaps in understanding.

MIKE I don't want to begin.

GARY And how do you feel about starting?

JACKIE That's fine, he went first last time.

GARY So tell me how it is you understand Mike's view of all this.

JACKIE He feels the mission of the company was made very clear to me as a part of the offer that I come and work as artistic director.

COMMENTARY

Jackie and Mike, with Gary's help, tried to articulate what they understood to be the other's view, each confirming when they were correctly understood and correcting any misunderstanding when they were not. No matter how much understanding can be achieved in this way, differences remain; and a solution to the conflict still needs to be found.

GARY

The temptation is now to try to generate some ideas someplace between your legal positions. Instead of going to that and trying to figure out what the answer should be, first that we really lay this new ground that I talked about before. The new ground would be each of you looking forward now into the future to really identify the things that are really important to you that would need to underlie any solution that you would find acceptable. I'm really suggesting that as a task that you would do outside of here and with the help of your lawyers.

CLARIFYING INTERESTS

COMMENTARY

Sometimes, the process of mediation can create value and expand the pie by turning the dispute into a deal. Doing this requires that there be clarity about the interests of the parties. A mediator plays a critical role in this process by helping identify and articulate at an appropriate level of generality what is important to each party. These interests provide the foundation on which later in the process various options are generated.

GARY

And from Jackie, from your perspective, the integrity of your work; being able to have artistic control over your own creations; to be able to complete your commitment; being fairly compensated for your original expectation when you entered into the agreement and for any future efforts that you might make to be able to complete the work; as well as supporting the vision of the company. So Jackie does this capture the interests?

JACKIE

I would just add one more thing, which under the circumstances may not seem like it would be identified as my interest but in fact it is. And that is, I do want to see this company succeed.

GARY Mike, from your perspective, the company's perspective, I want to see whether these capture the interests. First, maintaining the financial viability of the company. Second, honoring the company's commitments. Third, serving the company's vision. Supporting Jackie as an artist. And supporting other choreographers. And for the ability of the company to be able to control its own affairs. Does this fairly capture the interest of the company?

MIKE Yes, yes it does.

GARY Good.

CREATING OPTIONS

COMMENTARY

The next phase demonstrates how a mediator can facilitate the generation of options. The mediator should promote the active participation of the parties and their lawyers, and avoid the occupational hazard of falling in love with his own ideas.

GARY What I would like to do is propose a couple of ground rules. One is that during this process of brainstorming that we just put out any ideas that any of us have that might solve a piece or all of this and that there be no evaluation of any idea. And to support that I would like to suggest there would be no attribution.

JACKIE Well I have one I'll jump right in there. That I finish the work.

GARY Okay one option is that Jackie just finishes...

JACKIE Before the season

MIKE ...some contractual understanding as to artistic rights...

CONRAD ...Jackie completes her term of employment and they enforce their control by implementing the periodic reviews...

MIKE ...assisting the company in seeking out new works or new choreographers...

CONRAD

...to compensate her for those works and for working in that capacity during that period...

JACKIE

...to develop a teaching program in which guest choreographers would come and...

JOAN

...Jackie could come back, finish Ensemble and her name could be associated with that work and it could be...

CONRAD

...pay a lump sum and make some arrangement with regard to ownership of the existing works and part company...

GARY

So several of these ideas that you've suggested already are ways of actually making the pie bigger before we try to figure out how to divide it up. Eventually we're going to have to put price tags in relationship to those and try to figure out what kind of allocation makes sense.

JOAN

There is an implicit assumption in what you are saying that there is going to be money to go around meaning the money is going to come from the company to go around.

GARY

I'm not assuming anything about where any money is coming from or if there is going to be money. Some of these ideas that you've had in making the pie bigger actually create more money to go around. But in addition to that you are not just adding money to the pot here you're actually adding other kinds of value that has to do with creativity, choreography and development of new choreographers and education that are really going to add value to the whole dance world.

CONRAD

Let me just say though to essentially mirror something that Mike has said on occasion. We believe that there is compensation due. And we are willing to discuss things that we might do that would be of use and value to the company. But we are not coming into this conversation believing that, "Gee, there's nothing that would be due given the facts as they exist right now."

GARY

You start from a very different place.

CONRAD

That's correct.

EVALUATING OPTIONS

COMMENTARY

Once a variety of options are generated it then becomes necessary for each party to evaluate the options in light of his or her own interests.

GARY

So what I've done during our break is to take the ideas that you had and try to put them into different categories so that we could begin to explore them and try to winnow them down. And the four categories that I came up with started with works, first what would happen with respect to the three works. Second, what the future relationship would be between D.I. and Jackie. The third is what new programs would be able to be developed which would involve both. And the fourth the question of payments, what if any and how much. What I would like to do now is to see if we can take some of these different areas and go through these rather systematically to look at them really both sides in terms ideally of both sets of interests so that we're all looking at the whole problem.

MIKE

I think I can safely say having heard Jackie that finishing Ensemble stated simply serves the interests of both parties. (**GARY:** Mm hmm.) The question is what circumstances surround and follow from finishing Ensemble.

GARY

Obviously you are right until you've seen everything together in a package you're not going to be in a position to know whether or not you've got something that's going to really work. Looking at them against the interests I think will serve two functions. One is will help get rid of some of them. But we also might identify some of the ones that seem like they are most promising.

REACHING AGREEMENT

COMMENTARY

The mediation process demonstrated here shows how a mediator can work together with the parties and their lawyers to search for a resolution that better serves the parties than the litigation alternative. Having the

Some parties may lack the will or capacity to work through a conflict in the presence of the other side. Facilitating effective communication in the face of conflict poses real challenges for the mediator as well. But especially in circumstances where there is the possibility that the parties might benefit from an ongoing relationship, a model of mediation that promotes understanding can have conspicuous benefits.

GARY Do you understand what he is suggesting here?

JACKIE The exclusive right to perform Ensemble for some period of time and then non-exclusive right sounds good to me.

GARY So obviously there's more stuff that would need to work out in exploring it further. But I think I'd like to start to look at this question of the relationship between D.I. and Jackie and see what might be promising within that bundle. My goal again is to be sure that we get, if we get to an agreement, that it is an agreement you both feel leaves you both better off than you would have been if you were to pursue your alternatives and doesn't feel like you've given up anything important particularly in terms of these interests.

MIKE I think you've captured where we are. We have a season that begins in just a few weeks. Dancers have to be rehearsed. Jackie's conclusion has to be implemented. So I think that we have to reach sufficient agreement very shortly to satisfy Jackie to go back to work for that period of time.

CONRAD Let me just say I share Mike's concern that we get this resolved quickly and that we not extend this process through a period of time that might put us in the worse position for having gone through the process than we would be if chose other alternatives.

GARY It seems like the ball is in your court to kind of clarify what you would feel you would really need to be satisfied that you're not compromising yourself and making yourself vulnerable in some way that doesn't make sense to you by getting to work as soon as possible without knowing what the whole future is going to look like.

COMMENTARY

That's the last of our mediation segments.

Within two days of that meeting, they reached an agreement. Jackie would be paid four months salary -- a month retroactively to the time she was dismissed and for the next three months during which she would complete and produce Ensemble for the upcoming season. Jackie agreed to assign any copyright interest in Ensemble to D I, and D I agreed to grant Jackie a non-exclusive license to have Ensemble performed with other companies after the season to promote the performance of Ensemble in other cities with fees to be shared.

In addition, they agreed that D I would retain Jackie as a part-time consultant for an additional year to focus on specific projects to develop new choreographers. Jackie would be guaranteed a minimum of \$25,000 and would need to work at least thirty-five days, during which time Mike and Jackie would determine if the projects and their relationship were viable for the future.

Under the agreement, the success of the current season is protected and the morale of the company preserved. Under the consultant relationship, both Jackie and Mike know that they will have to work hard to build on the understanding reached between them during the mediation since either can end that relationship if the new projects are not creating new value.

The challenge for the lawyers in this mediation was both to protect and inform their clients while also supporting their active participation and ultimate decision making responsibility. Through their own direct participation in the mediation, Jackie and Mike have maintained some control over the process; respected, if not restored, their relationship; and found results that reflected what was important to the two of them and to the company.