ADR FOR BUSINESS LAWYERS

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I. INTRODUCTION

A. ***My Background.*** I was (i) a CPA with a Big Eight accounting firm before going to law school; (ii) a partner in three large law firms in Atlanta during my first 17 years in private practice, where I practiced in the corporate and tax areas; (iii) the General Counsel of a public technology company, now known as Premiere Global Services, Inc. (NYSE: PGI), for eight years; (iv) the Chief Financial Officer of Premiere on two different occasions during four of those years; and (v) the head of investor relations for Premiere during two of those years (which I can say without hesitation was the worst job I have ever had). I first became involved with mediation as a result of 25 shareholder lawsuits that were filed in 1998 against Premiere, its directors and certain executive officers (including me in my capacity as CFO), after two of our biggest customers went under within weeks of each other; 24 of those cases were settled through mediation. Since leaving Premiere in 2003 I have been a mediator and arbitrator, affiliated with Henning Mediation & Arbitration Service, Inc. in Atlanta, where I specialize in commercial and business disputes. I also returned to practicing law in early 2007, joining Friend, Hudak & Harris, a small telecommunications/technology firm that I had worked with at Premiere (they were our primary outside telecom counsel), where I again practice in the corporate and tax areas. I now split my time between my ADR practice and my law practice.

B. ***Goal of this Presentation.*** My goal is to give the business lawyer (*i.e.*, lawyers who are not litigators) an overview of alternative dispute resolution, or ADR, with an emphasis on mediation, and to discuss ways that business lawyers can get involved in ADR. This presentation is not intended to be a comprehensive treatment of mediation and arbitration of business disputes.

II. DEFINITIONS

A. ***"Alternative Dispute Resolution"*** or ***"ADR."*** A range of processes other than a lawsuit used by the courts, governmental agencies and private parties for resolving disputes. Mediation and arbitration are the two most common ADR processes, and mediators and arbitrators are referred to as "neutrals."

B. ***"Arbitration."*** A process whereby an impartial third party or parties (the arbitrator(s)) consider the evidence and arguments of the parties and render a decision, which may be binding or nonbinding.

> i. Most arbitrations are binding. In a nonbinding arbitration the arbitrator's decision is advisory only, and if dissatisfied, either party may file a lawsuit.

C. ***"Mandatory Negotiation."*** A contractual provision that requires the parties to negotiate in good faith for a set period to resolve disputes under the contract, and neither party may initiate an arbitration or file a lawsuit before the expiration of the mandatory negotiation period.

D. ***"Mediation."*** A nonbinding process by which an impartial third-party (the mediator) helps the parties try to resolve a dispute voluntarily on mutually agreeable terms. It is nonbinding in the sense that the mediator has no authority to make any decisions, with the decision making power residing with the parties.

> i. The essential difference between arbitration and mediation is that in arbitration the parties relinquish their decision-making right to the arbitrator who makes the decision for them (and thus is a form of adjudication), whereas in mediation the parties make the decision themselves.

E. ***"Med-Arb"*** and ***"Arb-Med"***

Med-Arb is a hybrid ADR process in which the parties agree first to mediate a dispute, and then to arbitrate any unresolved issues. The same neutral may serve as both mediator and arbitrator, or different neutrals may serve in these roles.

> i. Some feel that the same person should not serve as both mediator and arbitrator because it could (1) suppress the candor and openness that should characterize the mediation process and (2) result in evidence, legal points or settlement positions being communicated ex-parte, which could compromise the integrity of the evidence-based decision making of the mediator turned arbitrator.
>
> ii. I have served as both the mediator and arbitrator in med-arb situations, and I believe it can be a very effective ADR process, but it is important that all parties and their counsel understand the process and agree to it in advance.

iii. In recent years a process called co-med-arb has evolved in which two different neutrals are used, one as the mediator and one as the arbitrator. They work closely together to maximize their efficiency (*e.g.*, they both attend the joint session) but without confusing their roles (*e.g.*, only the mediator takes part in the private caucuses).

Arb-Med reverses the process, and the parties agree in advance that the neutral is authorized to arbitrate, make an award, and then mediate the dispute.

i. The award is usually sealed in an envelope and not disclosed to the parties unless the mediation is unsuccessful, at which time the award becomes binding on the parties. If the mediation is successful, typically the award is destroyed without being disclosed to the parties.

III. A FEW WORDS ABOUT ARBITRATION IN GEORGIA

A. Oftentimes a mandatory arbitration provision is included in a commercial contract without much thought being given to whether it should or should not be included.

i. Too many times that provision is considered "boilerplate" and receives little or no attention from the parties or their counsel.

B. The business lawyer in Georgia should be aware of the consequences of providing for binding arbitration in contracts governed by Georgia law. Georgia Code Section 9-9-13(b) provides that an arbitration award may be vacated on the following very limited grounds (emphasis added):

(1) Corruption, fraud, or misconduct in procuring the award;
(2) Partiality of an arbitrator appointed as a neutral;
(3) An overstepping by the arbitrators of their authority or such imperfect execution of it that a final and definite award upon the subject matter submitted was not made;
(4) A failure to follow the procedure of this part, unless the party applying to vacate the award continued with the arbitration with notice of this failure and without objection; or
(5) The arbitrator's manifest disregard of the law.

C. In ABCO Builders, Inc. v. Progressive Plumbing, Inc., 282 Ga. 308, 647 S.E.2d 574 (2007), the Georgia Supreme Court stated:

> Therefore, to prove that a manifest disregard of the law has occurred, a party wishing to have an arbitration award vacated must provide evidence of record that, not only was the correct law communicated to an arbitrator, but that the arbitrator intentionally and knowingly chose to ignore that law despite the fact that it was correct. … [T]his showing is an extremely difficult one to make, especially in light of the fact that an

> arbitrator is not required to make findings of fact or state his or her rationale in reaching decisions.

282 Ga. at 309, 647 S.E.2d at 575 (emphasis added). The Court went on to state that "there must be concrete evidence of [the arbitrator's] intent [to purposely disregard the law] either in the findings of the arbitrator, if he or she chooses to make such findings, or in the transcript of the arbitration hearing, if the parties choose to have the hearing transcribed." 282 Ga. At 309, 647 S.E 2d at 576.

i. Under ABCO Builders, a mere error of law does not constitute "manifest disregard," but instead it must be shown that the arbitrator "intentionally and knowingly chose to ignore" the law.

ii. It is important to note that in most cases this will be impossible to do because the most common type of arbitration award (the standard award) contains no rationale and no findings of fact or conclusions of law, and most arbitration proceedings are not transcribed.

D. In Hall Street Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 128 S. Ct. 1396 (2008), the United States Supreme Court held that judicial review of an award under the Federal Arbitration Act ("FAA") is limited to the narrow grounds enumerated in Sections 10 (to vacate an award) and 11 (to modify or correct an award) of the FAA, and the FAA does not permit parties to contractually expand such grounds.

E. In Brookfield Country Club, Inc. v. St. James-Brookfield, LLC, 299 Ga. App. 614, 683 S.E.2d 40 (2009), the terms of a lease required the parties to submit all disputes to negotiation and, if necessary, mediation and arbitration. The arbitration provision specified that the arbitrator would be bound by the strict terms of the lease, and also provided for court vacatur of the arbitrator's award "if the court finds the arbitrator's award is not consistent with applicable law or not supported by a preponderance of the evidence ... , all in addition to the grounds for vacation of an award as set forth in the Georgia Arbitration Code." 299 Ga. App. at 615, 683 S.E.2d at 42. The lease further specified that in case of conflict between the lease provisions and the Georgia Arbitration Code, the provisions of the lease would control.

i. The Georgia Court of Appeals held, on an issue of first impression (and "guided by" Hall Street), that the Georgia "Arbitration Code does not permit contracting parties who provide for arbitration of disputes to contractually expand the scope of judicial review that is authorized by statute." 299 Ga. App. at 617, 683 S.E.2d at 43. Thus, the Court of Appeals affirmed the trial court's order confirming the arbitrator's award.

ii The Georgia Supreme Court affirmed the Court of Appeals, stating:

> Having examined the reasoning and logic of Hall Street and decisions of other courts adopting its rationale, we find those

> cases to be consistent with the statutory and interpretive law of this state, and therefore persuasive. We also reiterate that arbitration in this state is no longer governed by common law, but is wholly a creature of statute, and thus it is the role of the legislature, not this Court, to augment any fundamental changes in the nature of the proceeding. Here the parties' decision to arbitrate grievances expresses their intent to by-pass the judicial system and thus avoid potential delays at the trial and appellate levels. 2010 WL 2557443 (Ga. 2010)

F. Considering the finality of most arbitration awards (particularly in Georgia), an arbitration provision should not be considered "boilerplate," and before including one in a contract the consequences of such inclusion should be fully understood by your client. Also, I believe it is a good practice to discuss its inclusion with a litigator.

IV. ADVANTAGES AND DISADVANTAGES OF MEDIATION VS. LITIGATION

A. ***Advantages***. The principal advantages of mediation are that it (i) is less expensive, (ii) is faster, (iii) has a high resolution rate, (iv) is confidential, (v) is less adversarial (which can help in preserving the relationship of the parties), and (vi) allows the parties to retain control over the outcome.

B. ***Disadvantages***. The principal disadvantages of mediation are that (i) the mediator has no power to impose a settlement, (ii) the mediator has no power to compel participation, (iii) a powerful party can influence the outcome, and (iv) it is nonbinding.

C. ***Business Disputes.*** Good business executives try to make rational risk-reward decisions based on the assessment of probabilities.

> i. In contrast, a judge or jury often rules totally in favor of one side or the other, even when the probabilities are more closely balanced.
>
> ii. Thus, it is often "too great a risk for a company to entrust its fate to the inscrutability of a judge or to the vagaries of a jury or the uncertainty of an arbitrator. For business people, litigation is not a logical way to resolve a dispute." James C. Freund, *Calling All Deal Lawyers—Try Your Hand at Resolving Disputes*, 62 BUS. LAW. 37, 40 (Nov. 2006).

V. STYLES OF MEDIATION

A. ***Facilitative.*** In its traditional form, mediation is a facilitative process in which the mediator does not render an opinion as to the issues, facts, law or ultimate outcome of the case. Rather, the mediator's job is to assist the parties and their counsel, through information exchange and creativity, in arriving at a decision that each is comfortable with (*i.e.*, the mediator "facilitates" a settlement between the parties), without the mediator expressing an opinion as to what is likely to occur if the parties fail to reach a settlement.

i. In this style of mediation the mediator engages the parties in problem solving, encouraging them to generate a variety of options that potentially could meet the interests and needs of both parties.

ii. Many facilitative mediators will also engage in reality testing of the parties. Unlike the evaluative mediator (discussed below) who renders an opinion, the facilitative mediator reality tests by asking neutral questions designed to help the parties understand the weaknesses of their case, the other side's strengths, and the risks involved in the positions they are taking.

B. ***Evaluative.*** An evaluative mediator is selected to give his/her opinion as to the likely outcome of the dispute should the parties not resolve the matter voluntarily in mediation.

i. It is important that the parties and their counsel agree to the evaluative approach in advance; when a mediator offers an opinion without being invited to do so by the participants, the opinion may not be welcome.

ii. The evaluative approach can be useful when the parties and/or their lawyers are taking unrealistic positions, and in breaking an impasse.

iii. One of the disadvantages of the evaluative style is that if it is used too early in the process, before the mediator has developed trust and rapport with the participants and their lawyers, the mediator's neutrality may be questioned, which can result in the mediator's loss of credibility.

iv. Also, disagreement about the likely outcome of a trial may not be the factor holding up settlement, and there may be emotional or interpersonal factors that have led to impasse that may be overlooked if the focus is solely on an evaluation of the legal merits of the case.

C. ***Transformative.*** Also called "non-directive" mediation, transformative mediation has proved to be useful in disputes involving parties whose relationships need to be repaired and/or maintained (*e.g.*, family and employment disputes).

i. In a transformative mediation, the mediator's goals are to facilitate "empowerment" (*i.e.*, increase in personal capacity) and "recognition" (*i.e.*, understanding what is important to others) to support full deliberation and informed decision making by the parties, and to enhance the parties' personal sense of power, capacity and effectiveness, while also looking beyond their own perspective and interests to understand the other person's perspective.

D. ***Hybrid.*** THE MOST EFFECTIVE MEDIATORS ADAPT THEIR STYLE TO HELP THE PARTIES OVERCOME BARRIERS TO REACHING A NEGOTIATED SETTLEMENT, WHICH OFTEN MEANS OPERATING ON A "FACILITATIVE/EVALUATIVE" CONTINUUM.

VI. SELECTION OF A MEDIATOR

A. ***Factors to Consider.*** One of the advantages of mediation is that the parties select the mediator. Some of the factors to consider are the mediator's:

i. reputation and experience as a mediator;

ii. educational and/or professional background;

iii. mediation style (*i.e*., facilitative, evaluative, hybrid);

iv. expertise in the subject matter of the dispute; and

v. personal characteristics.

B. ***Let the Other Side Choose.*** A party is often willing to accept a mediator chosen by the other side on the theory that instant credibility is established, both with the mediator and the other side, and a signal is sent to the other side that the party is willing to engage in the joint problem solving approach that is necessary to a successful mediation.

i. Unlike the selection of an arbitrator, whose job is to render a binding decision, the goal of a mediator is to facilitate a settlement; *i.e.,* to bring the parties together so they can craft their own solution.

ii. Agreeing to the other side's selection of a mediator often serves to advance that process.

iii. Because mediation is not an adjudicatory process, if the mediation is not successful a party is no worse off than it was before the mediation, and it can still choose to arbitrate, litigate, or use some other ADR process to resolve the dispute.

C. ***Qualities of a Good Mediator***

i. <u>Neutral and impartial</u>. A mediator must be careful to avoid even the appearance of partiality, prejudice or bias throughout the mediation process.

1. This does not mean the mediator cannot have a pre-existing relationship with any of the parties or their lawyers; in fact, the most successful mediators are used over and over again by satisfied parties and lawyers. However, any pre-existing relationships should be disclosed prior to the mediation.

ii. <u>Good interpersonal skills</u>. In order to establish rapport and trust with the parties and their lawyers, a mediator should (1) be a good listener and communicator; (2) be enthusiastic and optimistic; (3) be respectful of

the lawyers, the parties and their opposing viewpoints; (4) have a good sense of humor; (5) be sincere and empathetic; (6) have intuition about interpersonal dynamics; and (7) be able to ask difficult questions with sensitivity.

iii. Good judgment. This includes assessing the reality of the situation; sensing what will work for the parties and the lawyers; knowing what information to share and when and how to communicate that information so it will have maximum impact; knowing when to press people or not; and having common sense.

iv. Patience, persistence, tenacity and stamina. Mediation is an inherently tedious process, and it is important that a mediator be patient, persistent and tenacious, without being stubborn.

1. In addition, the mediator should be prepared to stay as long as it takes to finish the mediation; however, a mediator also needs to know when to stop the mediation.

2. If the dispute is not resolved at the mediation session, a good mediator will follow up after the session.

v. Confidence. A mediator needs to have confidence in his/her abilities, and this confidence must be conveyed to the parties and their lawyers.

vi. Good negotiation skills. Because mediation is essentially assisted negotiation, a mediator should be a good negotiator.

vii. Creative and open-minded. Resolving conflict demands creativity, which means the mediator must be open to the ideas of others, and should approach the mediation without preconceived ideas.

1. A creative mediator will get the parties and their lawyers to consider new solutions beyond what they would have considered without the mediator.

viii. Substantive expertise. Except for certain specialized areas (*e.g.*, construction), many experienced lawyers do not insist upon a mediator with expertise in the subject matter of the dispute. Instead, they are more concerned about selecting a mediator who is patient and skilled in joint problem solving and in bringing parties together, with the ability to get the parties to attack the problem instead of each other, who can be evaluative when necessary, and who believes in the process.

1. Because of the myriad areas that are involved in a business divorce (see detailed discussion later in this outline), which requires resolution both of disputed issues and business matters

that are not in dispute but need to be resolved for the split-up to take place (which Freund refers to as "deal-dispute mediating" because "the parties have to make a deal which has the effect of resolving their disputes … ." Freund, supra at 53), the parties and their lawyers would be well served to have a neutral who is not only a good mediator, but who has good business sense and negotiating skills, and an understanding of complex business issues as well as tax and accounting considerations.

VII. THE MEDIATION PROCESS

A. ***Prior to the Mediation Session.*** After I am selected as the mediator I promptly send an e-mail to the lawyers for the parties introducing myself and telling them that I appreciate the opportunity to serve as their mediator.

i. I also ask the lawyers to submit a *mediation statement* to me via e-mail, generally no later than five days before the date of the mediation session, which mediation statements are not shared with opposing counsel without the submitting lawyer's consent.

ii. The mediation statement should be as brief as reasonably possible, and should include (1) a factual summary and the procedural status of the case; (2) identification and bullet-style analysis of the key factual and/or legal issues; (3) history of settlement discussions, if any, and the last demand/offer; and (4) counsel's view as to the past and current barriers to settlement. I also request that they send me any additional documents they think would be helpful to my understanding of the case (*e.g.*, pleadings, memoranda, etc.).

iii. I tell the lawyers that after reviewing the mediation statements and any other documents I have received, I may speak with one or more of them prior to the mediation session if I have any questions or I need clarification.

iv. I also point out that my experience has shown that active participation of the parties is essential to reaching settlement, and that I will encourage the parties to speak in the joint session as well as in the private caucuses. My hope is to create an environment conducive to the parties speaking and listening to each other and not just to the lawyers. I also ask if the lawyers have any concerns about this.

v. Finally, I tell the lawyers in my e-mail that, assuming we successfully arrive at a settlement, they should give some advance thought to the settlement documentation, and they may want to consider exchanging proposed settlement language with opposing counsel in advance of the mediation session, or bring it with them to the mediation session. I tell them that, at the very least, I would expect the parties to

enter into some sort of written settlement memorandum at the conclusion of a successful mediation, which contemplates that the formal settlement documents will be prepared and executed by all parties as soon thereafter as possible.

B. ***The Joint Session.*** The usual format is to start in a joint session that includes the mediator and all parties and their lawyers. I generally start with an opening statement in which I (i) describe my background and experience; (ii) explain the purpose and advantages of mediation, including confidentiality; (iii) describe the roles of the mediator, the parties and their attorneys; and (iv) describe the mediation process. Although most attorneys have heard mediators' opening statements before (often many times before), it can serve to remind counsel, while educating their clients, that all participants share an interdependence in the mediation's success.

i. Following the mediator's opening statement, each side is given the opportunity to talk about its case, uninterrupted by the other side (although I may ask an occasional question). This gives each side, both the attorneys and the parties, the opportunity to tell the other side what is important to them. After each side has had the opportunity to make opening remarks, I will often ask questions and try to assist the parties by clarifying the issues that are in dispute.

ii. At the beginning of the joint session I remind the parties and their lawyers that in making their presentations they need to remember that everyone has come to the mediation session looking for something, and it is the people on the other side of the table who have the ability to give it to them.

1. In other words, the lawyers and their clients need to remember that they are not in an adversarial setting in a courtroom where they are trying to impress a judge or jury with how strong their case is so the judge or jury can begin to determine fault. The goal of mediation is to find a mutual solution rather than determine blame, and this will not be advanced by provoking the other side.

C. ***Private Caucuses.*** Following the joint session, the normal procedure is for the mediator to meet separately with each side in a series of private caucuses in a form of "shuttle diplomacy."

i. These caucus sessions give the parties and their lawyers an opportunity to talk privately with the mediator and to tell the mediator things they might not feel comfortable telling the other side. From the mediator's standpoint, the more he/she knows about the case, the more effective he/she can be.

ii. Direct negotiations between the parties are often unproductive because neither side is willing to disclose its honest views about a fair

settlement because of a fear that the other side will take advantage of the disclosing side's honesty. By getting each side to provide confidential information about its objectives and settlement positions through the private caucuses, a good mediator often discovers shared interests suitable for reconciliation.

iii. Basically, in the private caucuses the mediator is negotiating with the lawyers and their clients, but it is not the adversarial negotiating that would occur if both sides' lawyers were speaking directly to each other; it is more like the negotiating that goes on between two business lawyers negotiating an arm's length business deal that resolves the various remaining outstanding points.

iv. Freund points out that in the private caucuses the lawyers for the parties have two key objectives: <u>first</u>, to get the mediator disposed toward his/her view of the dispute; and <u>second</u>, to persuade the mediator to communicate that view to the other side under the mediator's imprimatur.

> 1. It is very similar to a business deal where one side's lawyer must convince the other side's lawyer as to the merits of the first lawyer's arguments, so the other lawyer can tell his/her client that they are acceptable. Freund, <u>supra</u> at 51.

v. Unreasonable, far flung litigation positions that are not really defensible might be legitimate for litigation and arbitration purposes, and the mediator generally excuses these in the opening session and possibly in the first private caucus session; however, lawyers representing parties in a mediation should keep in mind that to continue to take such positions after the discussion has progressed to the point where the mediator is attempting to find some basis for settlement, will likely result in a loss of credibility with the mediator.

vi. The mediator will often play "Devil's Advocate" in the private caucuses in order to help the parties and their lawyers decide whether their legal and/or negotiating positions are realistic.

vii. Some mediators believe that the mediator should tell the parties and their lawyers in the initial private caucuses with them that he/she does not want them to disclose their bottom lines to him/her up front. In THE MEDIATOR'S HANDBOOK: ADVANCED PRACTICE GUIDE FOR CIVIL LITIGATION 177-178 (NAT'L INST. FOR TRIAL ADVOC. 2000), John W. Cooley describes the reasons as follows:

> 1. <u>From the plaintiff's standpoint</u>, the defendant, despite prior statements to the contrary, may be willing to pay much more than the plaintiff thinks to settle the dispute. If the plaintiff's minimum acceptable figure is told to the mediator up front, the mediator may

not feel compelled to try to settle the case at a figure that is much more than that. Also, the plaintiff's minimum acceptable figure may change if the defendant reveals information that greatly increases the value of the plaintiff's case or which significantly undermines the plaintiff's position. In addition, the plaintiff may discover information that causes the plaintiff to value its case at a lower level. If a plaintiff commits to a minimum acceptable figure at the beginning of the mediation, the plaintiff may feel psychologically inhibited from moving off of it, thus sacrificing an opportunity to settle at a slightly lower amount.

2. From the defendant's standpoint, by giving the mediator a maximum amount it is willing to pay, the defendant cedes to the mediator most, if not all, of the defendant's control over the ongoing negotiation and mediation process. It also places the mediator in a difficult ethical situation if the mediator is asked by the plaintiff's side if there is any flexibility in the defendant's offers. The plaintiff's side will, in effect, be negotiating directly with the mediator without knowing it, which makes it very difficult for the mediator to remain neutral.

viii. As the private caucuses progress, the mediator may at times meet separately with a party's lawyer without the party present, and in some cases the mediator may meet with the lawyers for both parties without their clients.

ix. As mentioned above, mediation is an inherently tedious process, and there are usually numerous caucus sessions.

1. The mediator should let the participants know that there could be as much as an hour or more wait-time between caucus sessions (although the mediator should try to keep the caucus sessions under one hour if possible), and that the amount of time the mediator spends with the opposing side does not indicate that the mediator favors the opposing side.

2. Also, the mediator should emphasize to the participants that if at some point during the mediation they feel like things are at an impasse, they need to be patient and persistent, and not get frustrated.

D. ***Confidentiality***

i. Two Levels. There are two levels of confidentiality in a mediation.

1. The first level is the overall confidentiality of the mediation session; that is, what's said in the mediation session stays in the

mediation session. This encourages each side to speak openly without fear of what they say being used against them in the future.

2. The second level concerns the private caucuses. If a party or his/her lawyer tells the mediator something during a private caucus that he/she does not want the mediator to disclose to the other side, the mediator may not disclose such information. Again, the purpose of this is that the mediator wants the parties and their lawyers to be as open with the mediator as possible.

ii. Limits on Confidentiality. If facts are disclosed by one party to the other party in a mediation session, the other party can still use those facts in a subsequent lawsuit or arbitration, although the other party cannot use the statement of the facts in the mediation as an admission.

E. ***Settlement Documentation***

i. Settlement Memorandum. If the parties reach a settlement at the mediation session, before they leave the parties should at least sign a settlement memorandum that contains a list of the claims that have been settled.

1. Because this document is often prepared at the end of a long day of mediating, it is sometimes a fill-in-the-blanks form that is completed by hand.

2. The settlement memorandum should state that it contains all the essential elements of the terms and conditions of the settlement of the disputes addressed in the mediation, and that the formal settlement documents will be prepared and executed by all parties as soon as possible.

ii. Settlement Agreement. The formal settlement agreement should be drafted by the parties' lawyers, and the mediator should not be involved in the actual drafting, although the mediator may assist the lawyers in reaching agreement on specific provisions of the settlement agreement.

1. I have been the mediator in several mediations where the following language was included in the settlement memorandum:

"Any disputes regarding the terms and conditions of the Settlement Agreement or any other claims or issues related to this Settlement Memorandum and the disputes addressed in the mediation of this matter (the "Mediation") shall be resolved by Patrick G. Jones, Esq., as arbitrator, and such decisions shall be final."

2. In another mediation the settlement agreement included the following language:

"The parties agree that Patrick G. Jones, the Henning mediator, shall arbitrate any disputes arising between the First Parties and Second Parties concerning the interpretation and enforcement of this Settlement Agreement, and the arbitration decision of Mr. Jones shall be binding on all parties."

F. ***Failure to Settle at the Initial Mediation Session.*** It should not be assumed that because a dispute does not settle during the initial mediation session that it cannot be settled afterwards.

i. GOOD MEDIATORS WILL FOLLOW UP WITH COUNSEL FOR WEEKS, OR EVEN MONTHS, AND ARE FREQUENTLY SUCCESSFUL IN FACILITATING A SETTLEMENT LONG AFTER THE INITIAL MEDIATION SESSION.

ii. Because I specialize in business and commercial disputes, my mediations often continue after the initial mediation session, generally through e-mails and phone calls, but also including in-person meetings with the attorneys (usually separately), and in some cases one or more additional mediation sessions.

iii. The longest mediation I have been involved in had the mediation session in August and the settlement agreement was signed the following March, and I was heavily involved every inch of the way.

VIII. MEDIATING A BUSINESS DIVORCE. [For an excellent discussion of this topic, see James C. Freund, *Anatomy of a Split-Up: Mediating the Business Divorce*, 52 BUS. LAW. 479 (Feb. 1997).]

A. When a business partnership (I use "partnership" in the generic sense, and not to indicate the form of business entity) starts deteriorating, it can be very similar to a marriage divorce--disruptive, difficult and messy. The business partners are under emotional stress and their lines of communication break down, usually resulting in the operations of the business being adversely affected.

i. Ideally, at the beginning of a business relationship the business partners will enter into a shareholders agreement, operating agreement, partnership agreement, or other agreement that determines how the business separation will be handled.

1. Unfortunately, all too often that is not the case.

ii. Without such an agreement the partners will be faced with undesirable alternatives, such as suing each other or a forced dissolution and liquidation of the business, in which third parties or circumstances, and not the business partners, will determine the result.

iii. While lawyers and other advisors can help, their perspective is often colored by the emotional penumbra of their clients, which does little to advance rational and productive discussion.

iv. Mediation allows the business partners to call a time out from confrontation and to explore a resolution of the dispute with a neutral third party.

B. In a commercial dollar dispute (*i.e.*, a dispute whose resolution requires one party to pay a sum of money to the other), if the parties are unable to reach a negotiated settlement through mediation, they can go to court where a judge or jury will decide the issue for them.

i. However, in a business divorce, while there may be certain matters that can be litigated, there are often many significant business issues that do not involve claims of wrongdoing and thus are not litigable, but they still must be resolved for the business spit-up to take place.

ii. And even if a business issue is litigable, the judge or jury may not be able to resolve the issue as satisfactorily as the partners if they were able to negotiate effectively.

C. The mediation of a business divorce is a unique overlap of "dispute" and "deal" considerations. In some ways it is like negotiating between nonadversarial contracting parties, but it is also a dispute between hostile adversaries.

i. Basically, it involves making a deal between disputants who may once have had a good professional, and often personal, relationship, but who have become adversarial, sometimes to an extreme.

D. A business divorce often starts with the partners and their business lawyers engaging in discussions, without any litigators involved.

i. This is fertile ground for the experienced business lawyer, who brings business sense, negotiating skills, and a pragmatic approach. Moreover, if an effective mediator gets involved early in the process, many times there is no need to ever get any litigators involved.

ii. If the litigators do get involved and a lawsuit is filed, the business lawyer should stay involved, with the litigator handling the lawsuit, and the business lawyer working with the litigator to try to settle the lawsuit.

1. The business lawyer will be familiar with the important agreements and what they are supposed to mean, as well as the course of negotiations up to that point.

2. Also, a business lawyer will generally be more qualified to deal with the tax, accounting and valuation issues that are frequently involved in a business divorce.

iii. Having the litigator and the business lawyer work as a team can be beneficial because it allows the litigator to play the "bad cop" to the business lawyer's "good cop."

1. Having the litigator involved allows the business lawyer to be constructive in trying to negotiate a settlement without conveying weakness.

2. Also, if actual differences in viewpoints between the litigator and business lawyer surface during the private caucuses, this can be helpful to the client in deciding whether to settle or continue litigating.

E. There are two gating issues that must be addressed in every business divorce.

i. First, is divorce the best solution? Can the partners' relationship be improved to the point where a divorce is not necessary? Even if a significant improvement in relations is not likely, is the *status quo* preferable to a split-up of the business?

1. Unless the parties have already decided irrevocably to go their separate ways, the mediator should form his/her own judgment on the *status quo* alternative and help the parties explore their options.

ii. Second, what form will the split-up take?

1. Should the partners try to sell the business to a third party and distribute the proceeds?

2. Should one partner sell his/her interest to a third party?

3. Does one partner want to buy out the other's interest in the business? If so, the partners will need to reach agreement on the price and other terms of the sale, which will likely require that one or both of the partners hire an appraiser.

4. What if both partners want to stay in the business? In that case, the partners might want to work toward dividing the business between the partners. This often minimizes the significance of the difficult valuation issue, which is critical to a buyout, and focuses more on relativity than on absolute dollar amounts.

F. ***Experts.*** As mentioned above, in the mediation of a business divorce it is often necessary to get experts, such as business appraisers, involved. When experts are involved the major point of conflict in the dispute is often between the experts, and not the parties.

i. In some cases, where the parties are reluctant to settle because they are relying on experts whose opinions are far apart, it is in effect the experts who must be convinced to settle, which often results in the mediator, with the consent of the parties and their counsel, conducting a mediation session directly with the experts.

ii. In other cases, the mediator will utilize the assistance of a neutral expert who will either serve as a co-mediator, or who will review the evidence and submit a neutral recommendation to both parties.

iii. For an excellent discussion of this topic, see Robert S. Glenn Jr. & C. Allen Gibson Jr., *Neutral Experts, Standing Neutrals: Facilitating resolutions when parties rely on conflicting experts,* DISP. RESOLUT. MAG. 29 (Fall 2006).

IX. SOME OTHER BUSINESS AREAS IN WHICH ADR IS USED

A. ***Deal Mediation.*** While "deal mediation" has been practiced informally for decades, the concept of "deal mediation" has been formalized only within the last ten years or so. In deal mediation, a third party neutral is used to help the parties negotiate a deal, manage the deal, and/or repair a post-deal relationship. These individuals are sometimes referred to as "facilitators" instead of "mediators."

i. One of the major objections to deal mediation is the fact that lawyers have historically conducted successful negotiations.

1. However, just as there are lawsuits that are more difficult to settle directly and which have benefited from the intervention of a skilled third-party neutral, there are business deals that are more difficult to close directly, and it is in these deals that a third-party neutral may prove to be very helpful.

2. While some lawyers may see deal mediation as a threat, it is important to understand that a deal mediator does not supplant counsel for the parties.

ii. The case for deal mediation is relevant to any negotiation large and complicated enough to warrant the expense of engaging a third-party neutral.

1. By engaging a deal mediator, each party can concentrate on trying to achieve their own negotiation objectives without being concerned that it will disrupt or destroy the negotiations, because

the parties can rely on the deal mediator to keep the deal going in the right direction.

iii. A deal mediator should have excellent people skills, well developed mediation and negotiation skills, good business acumen and a persistent personality.

iv. While there are often investment bankers, consultants and advisors involved in business deals, these people typically do not have any mediation skills and are tainted by perceived allegiance to one party, and have their own self-interest that may impair them as deal mediators.

v. The role of the deal mediator is to facilitate communication and to manage the negotiation, while serving as a representative to both and to none. The objective of the deal mediator is to close the deal.

vi. If an ongoing relationship is necessary between the parties after the deal closes, using a deal mediator can help ensure that there are no bruised egos or damaged personal relationships that have to be endured after the closing.

vii. For a thorough discussion of deal mediation, see the outline materials from the teleconference sponsored by the ABA Section of Dispute Resolution on February 6, 2008, titled *Deal Mediation: A New Use for an Old Friend.*

B. ***Corporate Governance.*** Contemporary boards of directors are very different from those of a decade ago, prior to the Enron and WorldCom debacles, and the passage of the Sarbanes-Oxley Act in 2002.

i. The CEO dominated board has given way to an era in which boards are more independent and which reflect an increasingly diverse array of backgrounds, demographics, professional experience and skill sets.

ii. Directors are often recruited without any pre-existing connections to the CEO or the other directors, and their relationships develop during their board service.

iii. This trend brings with it the challenge to develop a board of diverse individuals that can act effectively in a collaborative, coherent and efficient manner to create long-term value for the company, the shareholders, and its other constituencies.

iv. Many believe that the skills and techniques typically used in ADR processes can improve board effectiveness by fostering discussion and deliberation, making decisions collaboratively, and bringing to the surface, and resolving, disagreements and personality clashes.

v. For two excellent treatments of how ADR techniques can improve board processes, see JON J. MASTERS & ALAN A. RUDNICK, IMPROVING BOARD EFFECTIVENESS: BRINGING THE BEST OF ADR INTO THE BOARDROOM—A PRACTICAL GUIDE FOR DIRECTORS (A.B.A. SEC. OF DISP. RESOL. 2005); and RICHARD C. REUBEN, CORPORATE GOVERNANCE: A PRACTICAL GUIDE FOR DISPUTE RESOLUTION PROFESSIONALS (A.B.A. SEC. OF DISP. RESOL. 2005).

C. *Tax*

i. Federal. In Announcement 2008-111, 2008-48 IRB 1224 (Nov. 28, 2008), the IRS announced that it had established a two-year pilot program to evaluate the effectiveness of mediation and arbitration in Offer in Compromise and Trust Fund Recovery Penalty cases that are under the jurisdiction of the Office of Appeals. That Announcement modified Rev. Proc. 2002-44, 2002-2 CB 10 (which provides for mediation in certain IRS cases), and Rev. Proc. 2006-44, 2006-2 CB 800 (which provides for arbitration in certain IRS cases). Rev. Proc. 2002-44 was subsequently superseded by Rev. Proc. 2009-44, 2009-40 IRB 462 (Sept. 11, 2009). For a more thorough discussion of the use of ADR in the federal tax area, see David L. Click, *Alternative Dispute Resolution of Tax Issues: Techniques Using IRS Appeals*, METROPOLITAN CORP. COUNS. 8 (Aug. 2008).

ii. State. The Multistate Tax Commission ("MTC") is an intergovernmental state tax agency working on behalf of states and taxpayers to administer, equitably and efficiently, tax laws that apply to multistate and multinational enterprises, and the MTC provides a voluntary ADR program for multistate tax disputes. See Mark Buchi, Bruce Ely, Stewart Weintraub & Steve Young, *An MTC Mediation Success Story*, A..B.A. SEC. OF TAX'N. NEWSQ. 12 (Summer 2008), which highlights the availability and benefits of MTC mediation in a multistate tax dispute.

X. DISPUTE RESOLUTION CLAUSES

A. *Arbitration*

i. Drafting Considerations. While there are a number of things to consider when drafting an arbitration clause, some of the more important are:

1. Will the arbitration clause cover all disputes, or only certain types?

2. Who will administer the arbitration?

3. Where will the arbitration take place?

4. What law will govern the arbitration?

5. How many arbitrators will be used?

6. If three arbitrators, will the party-appointed method be used, and if so, will the party-appointed arbitrators be non-neutral?

7. Will the arbitrator(s) be required to have certain qualifications?

8. Will the arbitrator(s) render a "reasoned award"? [Generally the arbitrator(s) will issue a standard award that includes only the conclusions of the arbitrator(s), and no findings of fact or reasons supporting the conclusions.]

9. Will the arbitrator(s) have the authority to award attorneys' fees and/or punitive damages? [Generally arbitrators do not have the authority to award attorneys' fees to the prevailing party unless the parties' contract provides for the award.]

ii. Sample Arbitration Clause

Any dispute, claim, disagreement or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate (collectively a ***"Dispute"***), shall be determined by final and binding arbitration in Atlanta, Georgia, before [one] [three] arbitrator[s]. The arbitration shall be administered by Henning Mediation & Arbitration Service, Inc. ("HMA"**)** pursuant to its rules, and judgment on the award rendered by the arbitrator[s] may be entered in any court having jurisdiction thereof. The foregoing notwithstanding, either Party may seek from any court having jurisdiction any interim or provisional relief that is necessary to protect the rights or property of that Party. [*Optional*: The arbitrator[s] may, in the award, allocate all or part of the costs, fees and expenses of the arbitration, including the fees of the arbitrator[s] and the reasonable attorneys' fees of the prevailing party.]

B. *Multi-Step Dispute Resolution Clauses*

i. Mandatory Negotiation Followed by Mediation

[*Alternative 1*](a) Except as provided in subsection (b) of this Section __, no civil action with respect to any dispute, claim, disagreement or controversy arising out of or relating to this Agreement (collectively a ***"Dispute"***), shall be commenced by any Party until after the Parties have used their best efforts to resolve such Dispute as follows. Initially, representatives of the Parties will meet in person and consult and negotiate with each other in good faith and, recognizing the mutual interests of the Parties, attempt to reach a just and equitable resolution of the Dispute.

[*Alternative 2*](a) Except as provided in subsection (b) of this Section __, no civil action with respect to any dispute, claim, disagreement or controversy arising out of or relating to this Agreement (collectively a ***"Dispute"***), shall be commenced by any Party until after the Parties have used their best efforts to resolve such Dispute as follows. Initially, the [title] of [Party A] and the [title] of [Party B] will meet in person and consult

and negotiate with each other in good faith and, recognizing the mutual interests of the Parties, attempt to reach a just and equitable resolution of the Dispute.

(b) If a resolution of the Dispute is not reached within thirty (30) days following the first in-person meeting pursuant to subsection (a), the Parties shall attempt, with diligence and good faith, to resolve the Dispute through mediation administered by Henning Mediation & Arbitration Service, Inc. ("HMA") in Atlanta, Georgia, in accordance with its procedures. Either Party may commence mediation by providing to HMA and the other Party a written request for mediation, and the Parties will cooperate with HMA and with each other in selecting a mediator from HMA's Panel of Neutrals. Unless otherwise agreed to by the Parties, the costs of such mediation will be borne equally by the Parties. All offers, promises, conduct and statements, whether oral or written, made in the course of the mediation by any of the Parties, their employees, experts and attorneys, and by the mediator or any HMA employees, will be confidential, privileged and inadmissible for any purpose, including impeachment, in any litigation or other proceeding involving the Parties, provided that evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or nondiscoverable as a result of its use in the mediation. Either Party may seek equitable relief prior to the completion of the mediation process to preserve the status quo pending completion of that process.

(c) Except for an action to obtain equitable relief described in subsection (b), neither Party may commence a civil action with respect to the Dispute submitted to mediation until the first to occur of the twentieth (20th) day after the completion of the initial mediation session and the forty-fifth (45th) day after the date of filing the written request for mediation. Mediation may continue after the commencement of a civil action if the Parties so desire. [*Optional*: If the Dispute is not resolved through mediation and either Party files a lawsuit to resolve the Dispute, the prevailing Party in such lawsuit will be entitled to recover such sum as the court may fix as reasonable attorneys' fees.] The provisions of this Section __ may be enforced by any court having jurisdiction, and the Party seeking enforcement shall be entitled to an award of all costs, fees and expenses, including attorneys' fees, to be paid by the Party against whom enforcement is ordered.

ii. Mandatory Negotiation Followed by Mediation and Arbitration

Subsections (a) and (b) are the same as above.

(c) If the Dispute is not fully resolved within twenty (20) days following completion of the initial mediation session or forty-five (45) days after the date of filing the written request for mediation, whichever occurs first, then any unresolved portion of the Dispute shall be determined by final and binding arbitration administered by HMA in accordance with its rules, in Atlanta, Georgia, before [one] [three] arbitrator[s] selected from the HMA Panel of Neutrals. Either Party may initiate arbitration by filing a written demand for arbitration with HMA. The Parties will cooperate with HMA and with each other in selecting an arbitrator[s] from HMA's Panel of Neutrals. Mediation may continue after the commencement of the arbitration process if the Parties so desire, and unless otherwise agreed by the Parties, the mediator shall be disqualified from serving as an arbitrator in the case. Judgment on the award rendered by the arbitrator[s] may be entered in any court having jurisdiction thereof. Either Party may seek from any court having jurisdiction any interim or provisional relief that is necessary to protect the rights or property of that Party, and the Parties agree not to defend against any application for interim or provisional relief on the ground that a mediation is pending. [*Optional*: The arbitrator[s] may, in the award, allocate all or part of the costs, fees and expenses of the arbitration, including the fees of the arbitrator[s] and the reasonable attorneys' fees of the prevailing party.] The provisions of this Section __ may be enforced by any court having jurisdiction, and the Party seeking enforcement shall be entitled to an award of all costs,

fees and expenses, including reasonable attorneys' fees, to be paid by the Party against whom enforcement is ordered.

iii. For additional samples of dispute resolution clauses, see *Drafting Dispute Resolution Clauses—A Practical Guide*, published by the American Arbitration Association (http://www.adr.org/si.asp?id=4125).