BUSINESS DIVORCES AND DISPUTES

DISPUTE RESOLUTION AND LITIGATION SECTIONS JOINT BREAKFAST MEETING

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MODERATOR

Halsey G. Knapp, Jr.
Krevolin & Horst, LLC
(www.khlawfirm.com)

PANELISTS

F. Carlton King, Jr.
Ford & Harrison LLP
(www.fordharrison.com)
JAMS, The Resolution Experts
(www.jamsadr.com)

Jeffrey D. Horst
Krevolin & Horst LLC
(www.khlawfirm.com)

Patrick G. Jones
Friend, Hudak & Harris, LLP
(www.fh2.com)
Henning Mediation & Arbitration Service, Inc.
(www.henningmediation.com)

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BIOGRAPHIES

Halsey G. Knapp, Jr.: In the 35th year of his practice, Halsey Knapp is described by *Chambers USA Guide to America's Leading Lawyers for Business* ("Chambers") as an "aggressive and attentive litigator with good trial experience and a strong reputation for business break up cases." Halsey has been recognized by his peers as a *Top 100 Georgia Super Lawyer* since 2009 and as a *Georgia Super Lawyer* since 2004, which suitably fits the preeminent business litigation practice of Krevolin Horst, his current home.

Halsey regularly advises clients on crisis management and best practices with particular emphasis on business arrangements, limited liability entity operating agreements, executive contracts, real estate transactions, graceful employment departures, and more antagonistic, high stakes, "bet the company" business divorces and litigation. Consequently, Halsey frequently is asked to handle relationship issues with clients, suppliers, competitors, owners, operators, and the occasional government prosecutor or regulator. Although Chambers cited Halsey for being a "talented trial lawyer noted for being tenacious," Halsey also brings a "solution-oriented" approach to disputes, as well as judgment and wisdom to any negotiating table. He is also a trained and registered neutral and serves as a board member of the Atlanta Bar Association's Dispute Resolution Section.

Halsey received his undergraduate degree in 1977 from Cornell University before earning his law degree in 1980 from Emory University School of Law, where he received the Best Brief Award in the Law Day Competition and served as President of the Student Bar Association. His association with Emory continues to this day as a Master, Executive Committee Member and former President of the Lamar Inn of Court, and a member of its Board of Law Advisors. Halsey has always been an active member of the legal community, serving as an officer of the 11th Circuit Historical Society, serving on the Federal Bar Association's Special Committees on the Role of Magistrate Judges (2010) and the Local Rules for the Northern District of Georgia (2012-2014), and serving on the Fulton County Business Court Committee Board. Halsey frequent speaks on jury selection, business litigation and alternative dispute resolution topics. He is also a frequent contributor to the *Wall Street Journal's Risk & Compliance Journal*.

F. Carlton King, Jr.: Forty-three years of trial experience gives Carlton a practical perspective on alternative dispute resolution. He is listed in *Best Lawyers in America* in the areas of Commercial Litigation, Mediation, and Arbitration.

Jeffrey D. Horst: After graduating from Ohio State University College of Law in 1983, Jeff was an associate and then a partner at Bondurant Mixson & Elmore, LLC from 1984 to 1995. Jeff then formed Krevolin & Horst, LLC where he represents companies and individuals involved in litigation regarding appeals, business torts, contracts, corporate governance, insurance coverage, intellectual property, officer/director, securities, shareholder disputes, and trade secrets.

Jeff has tried cases in five states, including a five-month jury trial in Tampa, Florida, winning a defense verdict that the *National Law Journal* selected as one of the top 10 defense verdicts of the year. Many of his cases have received media attention in the *New York Times, LA Times, the Wall Street Journal, National Law Journal, Tampa Tribune, Fulton County Daily Report,* and others.

Jeff is a Fellow in the American Academy of Trial Counsel. Less than half a percent of lawyers are selected for this honor nationwide. He has been selected as one of the top business litigators in Atlanta by *Chambers USA Guide to America's Leading Lawyers for Business* from 2008-2014. Based on peer recommendations, Jeff has been selected on multiple occasions as a *Top 100 Georgia Super Lawyer*, *Georgia Legal Elite*, and *Best Lawyers in America*.

Patrick G. Jones: After graduating from Wake Forest in 1973 with a major in Accounting, Pat spent three years at Price Waterhouse (where he obtained his CPA certificate), followed by three years at Emory Law School, graduating in 1979. He spent the next 16-1/2 years in private practice with three large law firms in Atlanta, where he practiced in the corporate and tax areas. He then spent eight years with PTEK Holdings (f/k/a Premiere Technologies and n/k/a Premiere Global Services; NYSE: PGI), where he was the General Counsel all eight years, and for almost four of those eight years he was also the CFO, and for the first two years he was also the head of investor relations (which he will tell you was by far the worst job he ever had). After he left Premiere/PTEK in September 2003 Pat became a mediator and arbitrator with Henning Mediation & Arbitration Service in Atlanta, where he specializes in commercial and business disputes, with a subspecialty in accounting malpractice. In early 2007 (and with numerous college tuition obligations looming on the horizon), Pat returned to practicing law when he joined Friend, Hudak & Harris, where he again practices in the corporate and tax areas. He now splits his time between his ADR and law practices.

Pat has served as the Chair of the Audit Committee and a member of the Compensation Committee of a private technology company for the past 14 years, and he has served as an advisor to the board of directors of a manufacturing company. Pat was also the co-chair of the Georgia Limited Liability Company Committee, which drafted the Georgia Limited Liability Company Act, and is a co-author of the *Georgia LLC/LLP Handbook.*

Pat is a Registered Neutral (General Mediation and Arbitration) with the Georgia Office of Dispute Resolution; on the FINRA (formerly NASD) roster of arbitrators; a founding member of the Georgia Academy of Mediators & Arbitrators; a member of The National Academy of Distinguished Neutrals; and an Associate Member of the Chartered Institute of Arbitrators. He has been selected by Martindale-Hubbell and ALM as one of *Georgia's Top AV Rated Lawyers* in Alternative Dispute Resolution, Business & Commercial.

BUSINESS DIVORCES AND DISPUTES

Patrick G. Jones

I. MEDIATION. Good business executives try to make rational risk-reward decisions based on the assessment of probabilities. On the other hand, a judge or jury often rules totally in favor of one side or the other, even when the probabilities are more closely balanced. 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) (emphasis added). [A copy of this article is attached to this outline.]

A. "Lawyers often use the term 'business divorce' to describe a contentious split-up of the ownership of a business. Smoldering resentments can further complicate the process in the case of family held enterprises, particularly if a second generation is at the helm. The founders themselves can also drift apart—experienced corporate lawyers have no lack of examples from their practice of a profitable small business on a downhill trajectory as the owners struggle with each other over the allocation of assets, customer relationships and liabilities." Richard Lutringer, *Business Divorce Mediation*, 2 N. Y. DISP. RESOLUT. LAW. 64, 64 (Fall 2009).

i. 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.

ii. 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.

iii. 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.

iv. 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.

v. 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.

i. Freund refers to this as "deal-dispute mediating" because "the parties have to make a deal which has the effect of resolving their disputes." Freund, *supra* at 53.

ii. In some ways it is like negotiating between nonadversarial contracting parties, but it is also a dispute between hostile adversaries. 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, 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. As a general rule, it is better to start the mediation process in a business divorce sooner rather than later.

i. "If the end goal is in fact settlement, service of process, in itself, may so polarize the parties that the mediation of the dispute may become more difficult.

By the time the mediation is suggested by the court or one of the parties who has just received the first legal bill for the litigation, papers will have been exchanged, discovery may have begun and characterizations of nefarious conduct by the controlling shareholder or incompetency of the minority shareholder/employee have all but buried a once collegial relationship. Weeks or months have been spent preparing for document delivery, depositions and conferring with their respective litigating attorneys about the strategy to 'destroy' the other side's case. In many instances, formerly cordial social life has been affected as spouses are drawn in and the relationship withers. *Mediators have sometimes been described as magicians in their ability to resolve difficult disputes, but the skill of resurrection is more difficult*." Lutringer, *supra* at 65-66 (emphasis added).

ii. However, it is important for each side to understand the strengths and weaknesses of their case as well as well as that of their counterparty before a meaningful conversation about settlement can take place; therefore, it may be necessary for some formal discovery or informal exchange of documents to occur prior to the first mediation session.

1. Also, It may be necessary to obtain an appraisal (or appraisals) of the business, as well as advice on the tax consequences of the various alternatives, prior to the first mediation session.

iii. This is one of the reasons I like to speak with the lawyers prior to the first mediation session; *i.e.*, I want to make sure we are not holding the first mediation session too soon.

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

i. First, is divorce the best solution?

1. Can the partners' relationship be improved to the point where a divorce is not necessary?

a. See D. Michael Kratchman, *Anatomy of Mediating a Business Reconciliation*, FINDLAW (Mar. 26, 2008), at http://corporate.findlaw.com/corporate-governance/anatomy-of-mediating-a-business-reconciliation.html, for an interesting discussion regarding the use of psychoanalysis in business mediations involving disputing partners to improve the odds of reconciliation instead of divorce.

2. Even if a significant improvement in relations is not likely, is the *status quo* preferable to a split-up of the business?

3. 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?

a. 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?

a. In that case, the partners might want to work toward dividing the business between the partners.

b. 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.

5. Should the business go through a planned dissolution and liquidation?

6. *It goes without saying that the tax consequences of the various alternatives must be considered and factored into the final decision, and it is always wise to involve a tax professional early in the discussions*.

G. In the mediation of a business divorce it is often necessary to get experts, such as business appraisers, involved.

i. If valuation of the business is an important factor (and it almost always is), valuation reports should be prepared and submitted to the mediator prior to the first mediation session.

1. I have found it to be extremely helpful to have the valuation expert(s) personally attend the mediation session so I can question them regarding their own valuation reports and the opposing party's valuation report.

ii. 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.

iii. 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.

iv. 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).

H. **"Med-Arb"** and **"Arb-Med"**

i. 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.

1. Some feel that the same person should not serve as both mediator and arbitrator because it could (a) suppress the candor and openness that should characterize the mediation process and (b) 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.

2. 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.

3. One of those cases involved a two-person architecture firm that was going through a business divorce. The entity was an S corporation (which complicated things from a tax standpoint), and, as is often the case with a small business, there was no shareholders' agreement to guide the shareholders through the split up. In addition, both architects (a) had borrowed under their home equity lines of credit and lent the money to the corporation, but with no promissory notes, (b) had corporate credit cards, and (c) had personally guaranteed the corporation's $25,000 business line of credit on a joint and several basis, all of which complicated things in general. Neither of the architects had a regular attorney, and they did not want to have any attorneys involved in the mediation, although each one brought a non-attorney with him to the mediation session. (This was their idea, with one of the parties bringing an older gentleman whom he described as his "friend/advisor," and the other party bringing his CPA/financial advisor.)

4. After I received confidential "position papers" from both parties, as well as the corporation's Articles of Incorporation, Bylaws, minutes book, and financial statements and tax returns for the last three years, we had a five-hour mediation session that included a two-hour joint session and three private caucuses. Following the third caucus, one of the parties exercised his right to convert the process to an arbitration. At that point we had another joint session so I could explain the process going forward, as follows:

> a. I would draft an award that would include (1) the several matters the parties had already agreed on at the mediation session, and (2) all other matters that I believed were necessary to split up the business on an equitable basis. In addition, while the award would not include my reasoning, it would contain enough detail so the parties and their counsel would understand what I meant when counsel drafted the settlement agreement described in the next paragraph.

b. Following the issuance of the award, each of the parties would need to hire an attorney in order to draft a comprehensive settlement agreement that would include the items set forth in the award, as well as mutual releases and other provisions that are typically included in a comprehensive settlement agreement. In addition, I would retain jurisdiction until the settlement agreement was finalized and signed by all parties thereto.

Note: The main reason I required a settlement agreement, which I do not ordinarily require in an arbitration, was that I wanted each party to hire an attorney, not only to draft and negotiate the language of the settlement agreement, but to help him adhere to the terms of the award and to be available to advise him in any disputes that might arise under the award (or settlement agreement) in the future. I also wanted to bring finality to the business divorce by having mutual releases, but I did not want to include the detailed mutual release language in the award itself.

c. Prior to the issuance of the award the parties could communicate with me only through e-mail, in which case the other party had to be copied on such e-mail, and when I responded to a party I would copy the other party.

d. The arbitration award was issued about two weeks after the mediation session. While the award provided that the parties would "consult with their counsel and accountants in order to draft a comprehensive settlement agreement," what actually happened was that one of the parties hired a very capable attorney to draft a settlement agreement and mutual release (the "Settlement Agreement"), which was sent to the other party and me to review. I had no comments on the document because it contained all the relevant provisions from the arbitration award, as well as mutual releases and other provisions that are typically included in a comprehensive settlement agreement, none of which were slanted in favor of the drafting attorney's client. It appears that when I notified the attorney and both parties that I had no comments, the other party decided to save some money by not hiring his own attorney, although he did have his accountant review the Settlement Agreement from a tax standpoint.

e. The Settlement Agreement was signed shortly thereafter and I have not heard from either party since, which was almost ten years ago.

5. While this process worked well in these circumstances, using med-arb in a more contentious situation with lawyers involved might not proceed so smoothly.

6. For a discussion of the single-neutral med-arb process see Herbert H. Gray III, *The Economy of Single-Neutral Med-Arb*, DR CURRENTS 3 (Spring 2011).

ii. 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).

iii. 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.

1. 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.

2. While arb-med may seem counterintuitive, attached to this outline is a copy of an article titled *Einstein's lessons in mediation*, which is an interesting case study in the successful use of arb-med in a commercial setting.

II. 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*.

III. SELECTION OF A MEDIATOR. One of the advantages of mediation is that the parties select the mediator. Selecting the right mediator is always important, but it is particularly important in the mediation of a business divorce.

A. ***Factors to Consider.*** 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. ***Qualities of a Good Mediator***

i. Neutral and impartial. 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. Good interpersonal skills. 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, persistence, stamina, and more persistence. Mediation is an inherently tedious process, and it is important that a mediator be patient, persistent and tenacious, without being

stubborn. Of these qualities, I believe most lawyers would say that persistence[1] is the most important.

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, 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, as mentioned above, Freund refers to as "deal-dispute mediating," 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*.

[1] "Persistence" is defined in the *Miriam-Webster Online Dictionary* as "the quality that allows someone to continue doing something or trying to do something even though it is difficult or opposed by other people."

IV. 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 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. I explain that the mediation statement should be as brief as reasonably possible, and should include (1) a factual summary of the case; (2) identification and bullet-style analysis of the key factual and/or legal issues, which should include what they believe are the strongest and weakest parts of their case and the strongest and weakest parts of the other party's case; (3) history of settlement discussions (including any prior mediations), and the last demand/offer; and (4) counsel's view as to the past and current barriers to settlement.

iii. 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, transaction documents, financial statements and tax returns).

1. In a business divorce it is critical that I receive copies of all organizational documents, and the operating agreement if the business entity is a limited liability company ("LLC"), and the shareholders agreement (if there is one) if the business entity is a corporation, prior to the mediation session.

iv. I also point out that a successful mediation requires the participation of persons on all sides who have full settlement authority.

1. While I much prefer that the decision makers be physically present at the mediation session, if that is not possible, I emphasize to the lawyers that the absent decision maker needs to be available by phone, including after business hours.

v. Finally, I tell the lawyers that I want to make sure we have sufficient time to fully, fairly and creatively explore all settlement opportunities, and thus I have not set any time constraints for the ending of our mediation day.

vi. After I send out the introductory e-mail in a business divorce case, I almost always try to speak with the lawyers prior to the first mediation session. As mentioned above, one of my reasons is to make sure we are not holding the first mediation session too soon. These conversations also

help me to identify any emotional or special issues that I should be aware of but were not disclosed in the mediation statements.

1. Often these conversations also help me identify business issues that may have been overlooked in the mediation statements.

2, While it is likely I would have learned of these emotional, special and/or business issues during the course of the mediation, I will be much more effective during the first mediation session if I am aware of them prior to the session.

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 describe my background and experience; explain the purpose and advantages of mediation, including confidentiality; describe the roles of the mediator, the parties and their attorneys; and describe the mediation process.

i. 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.

ii. 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).

1. These statements are usually made by the lawyers, although one or more of the parties will sometimes make additional comments after their lawyers have finished.

2. Following each lawyer's opening statement, I usually ask that lawyer's client if he/she has anything to add to what his/her lawyer said.

iii. 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.

2. 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.

3. This is particularly important in the mediation of a business divorce, where there is often already a lot of hard feelings and ill will.

iv. There seems to be a trend toward skipping the joint session, or at least skipping the opening statements made by the lawyers.

1. I almost always have a joint session in a business divorce mediation, if for no other reason than to allow me to explain the process to the parties just once, instead of having to explain the process to each side separately in the first private caucuses.

2. I also like to hear opening statements from the lawyers in a business divorce mediation, although I have had several mediations where the opening statements were skipped with the concurrence of both lawyers.

3. I recently had a mediation where a niece was up against her three uncles in a business divorce (her father had been the fourth partner in the business before his death), and she simply would not agree to be in the same room with them.

a. We conducted the joint session and the lawyers' opening statements via Skype, with the niece and her attorney in one conference room at Henning, and the three uncles, their lawyers and me in another conference room at Henning.

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.

1. 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: first, to get the mediator disposed toward his/her view of the dispute; and second, 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, *supra* at 51.

v. Lawyers representing parties in a mediation should keep in mind that 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, but 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. 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.

viii. As mentioned above, mediation is an inherently tedious process, and there are usually numerous caucus sessions, and this is especially true in the mediation of a business divorce.

ix. As mentioned above, experts often play an important role in business divorce mediations, and if valuation is a critical issue, their participation in the private caucuses can be very helpful.

D. ***Settlement Documentation***

i. Settlement Memorandum. If the parties reach a settlement at the mediation session, a good mediator will not let the lawyers or their clients leave until they have signed at least a settlement memorandum that includes 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 agreement and related documents will be prepared and executed by all parties as soon as possible.

3. A settlement memorandum will often provide that any disputes regarding the terms and conditions of the settlement agreement will be resolved by the mediator, as arbitrator, and his/her decisions will be final.

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. Oftentimes the settlement agreement will contain many terms and conditions that are typical in a stock (or LLC interest) purchase and sale agreement or a stock (or LLC interest) redemption agreement.

2. If the business entity is an S corporation or LLC there will also be numerous additional tax issues to consider.

3. *It is important that the lawyers for the parties understand this, and recognize that if they do not have the requisite expertise, they should obtain the assistance of qualified corporate/tax counsel in drafting the settlement agreement*.

4. A mediator with significant corporate, tax and accounting experience can be very helpful in spotting issues, and in helping to craft creative solutions.

E. ***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. In my experience, it is a rare business divorce that settles during the initial mediation session.

1. 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.

1. 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 (in part because after the mediation session I was working on a contingent fee arrangement, but that's another topic for another day).

V. DEAL MEDIATION. While "deal mediation" has been practiced informally for decades, the concept of "deal mediation" has been formalized only within the last fifteen 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.

A. While a detailed discussion of deal mediation is beyond the scope of this outline, there follows an interesting quote regarding the differences between deal lawyers and litigators.

> "It sometimes seems that the community of business lawyers is divided into two broad tribes: The lawyers who handle the deals, and the lawyers who handle what happens when the deals fall apart. Unfortunately, these two tribes too seldom mix. They don't go to the same ABA meetings, their spouses don't dine together, their kids are on different soccer teams.
>
> Yet each has skills that the other would benefit greatly from developing. Deal lawyers have an approach to problems that litigators would do well to adopt. And litigators use tools that deal lawyers (and their clients) would benefit from.
>
> *Deal lawyers are problem-solvers*. They see the whole picture. Clients who engage them intend to make money by coming to an agreement that benefits them at the same time that it addresses the expectation of their counterparty. There is little on the table except the business, the money, the deal. *Each deal lawyer is there to*

negotiate terms that will benefit the client, make sense to the counterparty, and get the deal done.

By contrast, litigators are gladiators. Their job is to 'win.' They often don't see (more accurately, they are not entrusted with) the whole picture. *Their clients intend to see justice done, and to extract their vengeance, by making the other party wish it had never been born. There is little in the arsenal except bombs, and success is measured not by money, but by blood. The lawyer isn't there to make money, or even to save money, but to kill*.

This is true despite everyone's acknowledgement that we don't try litigated cases any more. More than 98% of filed cases are terminated by means other than a verdict at trial. They are withdrawn, they are dismissed, or (in the case of many business disputes) they are settled on mutually satisfactory terms that include stipulated dismissal, mutual releases of all claims, and either agreed-upon payment or reformation of the terms of the original deal.

Clients are, presumably, satisfied with the work of the lawyers who put the deal together through negotiation. Therefore it would, presumably, be advantageous to those clients if those same lawyers negotiated a solution to the problem that gave rise to the litigation—a solution that ended the litigated claim, provided for payment and/or reformation of the deal, and a speedy return to business. *The mind-set of the transactional lawyer—that the client's business is best served by negotiated deals—is highly valued in dispute resolution, and it is a pity that more transactional lawyers are not involved in resolving business disputes*.

Conversely, deal lawyers perceive the negotiation process as a one-on-one game. *They have a high regard for their negotiation skills, and the suggestion that value might be added through the intervention of a neutral facilitator is not just meaningless—it is insulting*. Deal lawyers want control, they want a clear field for strategy, and they want no interference or meddling. They certainly don't want to suggest to a client that they are inadequate to close this deal themselves, and need a go-between.

By contrast, many litigators are highly attuned to the utility of mediation in devising an optimal negotiated outcome. Adding a skilled middleman in settlement negotiations can reduce transaction costs and add value in multiple ways. Mediators can assist lawyers in helping their clients to prioritize their goals, and distinguish between critical terms and those that are less important.

> Mediators can help to 'bundle' deals, linking a 'give' and a 'take' in order to create trades that are of minimum cost and maximum value to both parties. Mediators can coach parties and counsel in negotiation strategies. Mediators can add rigor to the valuation process through decision trees or discounted present value analysis of outcomes. Mediators can assist parties to recognize cognitive barriers in their own or their adversaries' assessments, and provoke 'reality testing' of positions or tactics. Mediators can develop 'most favorable,' 'least favorable,' and 'most likely' scenarios that can have a decisive impact on the value of the claim. Mediators can urge clients to develop their best alternatives in the event that settlement negotiations fail. Mediators can push disputants through impasse."

F. Peter Phillips, *What Deal Lawyers and Dispute Lawyers Can Learn from Each Other*, BUSINESS CONFLICT BLOG (Jan. 9, 2014), at http://businessconflictmanagement.com/blog/2014/01/what-deal-lawyers-and-dispute-lawyers-can-learn-from-each-other/ (emphasis added).

VI. DISPUTE RESOLUTION CLAUSES

A. ***The Midnight Clause.*** This refers to the dispute resolution clause because all too often it is addressed at the end of the contract negotiations (and many times after midnight) as more or less an "afterthought," with very little consideration given to the consequences. A typical scenario would be where a litigator receives a call or e-mail at the 11th-hour from one of the corporate associates working on the deal, who asks the litigator to send him or her a "standard" or "boilerplate" dispute resolution clause. Unfortunately, there is no such thing.

i. Each dispute resolution clause should be carefully drafted to fit the needs of the parties and the deal, which involves taking into account, among other things, the likely types of disputes, the parties' long-term relationship, and the applicable laws.

1. Clearly, one size does not fit all.

ii. A poorly drafted or incomplete dispute resolution clause can do more harm than good, and paying attention to dispute resolution issues at the time the contract is drafted can avoid costly surprises later on, when the ability of the now disputing parties to agree on anything has diminished significantly.

ii. It is a classic case of "you can pay me now or pay me later."

B. ***Arbitration.*** While there are a number of things to consider when drafting an arbitration clause, some of the more important are:

i. Will the arbitration clause cover only certain types of disputes (*e.g.*, contract disputes or disputes under a designated dollar amount) or all disputes?

1. Sometimes a contract will include a general arbitration clause as well as a more specific arbitration clause that covers a very limited category of disputes.

2. For example, disputes involving post-closing purchase price adjustments in connection with the sale of a business are particularly well suited for specific arbitration clauses.

ii. Will the arbitration be *ad hoc* or administered?

1. *Ad hoc* arbitration refers to an arbitration in which the parties have chosen to conduct the arbitration without the assistance of an arbitral institution. While *ad hoc* arbitration avoids the administrative fees charged by arbitral institutions (which can be substantial), the trade-off is that the parties will assume the administrative and planning responsibilities generally performed by the arbitral institution.

2. An administered arbitration is one in which the parties have chosen to conduct their arbitration with the assistance of an arbitral institution (such as AAA, JAMS or Henning), and pursuant to such institution's procedural rules (hereinafter referred to generically as "Arbitral Rules").

a. Arbitral Rules are neutral and self-executing; *i.e.*, they provide for the arbitration to move forward despite the refusal of a party to respond to the initial arbitration demand or to appear at the hearing.

b. Arbitral institutions generally provide administrative, logistical and secretarial support to the parties, and also handle the arbitrators' fees and billing.

c. Of course, all of this comes at a cost, which can be significant.

d. Generally, with the exception of fee schedules, most Arbitral Rules allow the parties to vary the procedures set out in such Rules.

iii. Where will the arbitration take place?

iv. What law will govern the arbitration?

v. How many arbitrators will be used?

1. It is generally advisable for the parties to specify the number of arbitrators in the arbitration clause and how they will be selected.

a. The naming of a specific individual as the arbitrator should be avoided, since that person may not be available (or even alive) at the time of a dispute.

2. The parties may want to consider providing for one arbitrator for certain types of disputes (such as those under a designated dollar amount), and three arbitrators for all other disputes.

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

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

1. One of the major advantages of arbitration is that the parties can specify in the arbitration clause the qualifications that a potential arbitrator should have (*e.g.*, someone who is in the same industry as the disputing parties or has substantive knowledge in the disputed area), although too much specificity should be avoided because it can significantly reduce the number of available and qualified arbitrators.

2. This works well with three-member panels where it is possible to require that one of the arbitrators have certain specified qualifications (*e.g.*, must be an accountant or engineer), which will ensure that the desired technical expertise is represented on the panel, while also having a chair with experience in the arbitration process.

viii. What type of award will be issued?

1. The only formal requirements for an award under the Georgia Arbitration Code, the AAA C*ommercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes)* (the "AAA Rules"), the JAMS *Comprehensive Arbitration Rules & Procedures* (the "JAMS Rules"), and the Henning *Rules for Arbitration* (the "Henning Rules"), are that it be in writing and signed by a majority of the arbitrators.

a. A broad arbitration clause and most Arbitral Rules give the arbitrator the power to grant any remedy or relief that the arbitrator deems just and equitable.

2. There are two main types of awards: a "standard award" (also called a "general," "regular" or "bare" award) that includes only the relief granted and to whom, and does not include any reasons supporting the award, and a "reasoned award" that includes the reasoning of the arbitrator. In practice, most awards are standard awards, and an arbitrator will issue a reasoned award only if required by the arbitration clause or the applicable Arbitral Rules.

a. The AAA Rules provide that the arbitrator is not required to render a reasoned award unless the parties request such an award in writing prior to the arbitrator's appointment, unless the arbitrator determines that a reasoned award is appropriate. The JAMS Rules, on the other hand, provide that unless all the parties agree otherwise, an award shall contain a concise written statement of the reasons for the award. The Henning Rules provide that an award may or may not state the reasoning on which it rests, as decided in the discretion of the arbitrator.

3. In my experience the cost of a reasoned award will be considerably higher than the cost of a standard award, and the decision to require a reasoned award should not be made lightly, particularly when the amount in dispute is not significant.

ix. Will the arbitrator(s) have the authority to award attorneys' fees?

1. Under both the Georgia Arbitration Code and the Federal Arbitration Act, an arbitrator has the power to award attorneys' fees if the parties expressly agree in the arbitration clause.

2. Some arbitration clauses provide that each party will bear its own attorneys' fees (the "American Rule"), and some provide that the "prevailing party" will recover its attorneys' fees from the losing party.

a. In some cases the determination of who is the "prevailing party" can be a challenge.

3. In domestic arbitrations arbitrators are sometimes reluctant to award attorneys' fees because under the American Rule courts may not award attorneys' fees absent statutory or contract authority.

4. Most Arbitral Rules allow for the allocation of attorneys' fees if such allocation is provided in the arbitration clause or allowed by applicable law.

C. ***Multi-Step Dispute Resolution Clauses.*** Step clauses call for the parties to take certain preliminary steps, such as negotiation and mediation, before they can initiate arbitration proceedings. This gives the parties an opportunity to develop creative, business oriented solutions in a less adversarial setting before investing the time and money in an arbitration.

i. Mandatory negotiation followed by arbitration. This type provision typically requires a meeting among the business people first to attempt to negotiate a resolution of the dispute, and only if that effort is unsuccessful will a party be able to initiate an arbitration proceeding.

ii. Mandatory negotiation followed by mediation and arbitration. This typically requires the same type of meeting among the business people, followed by mediation, and only if both efforts are unsuccessful will a party be able to initiate an arbitration proceeding.

1. Requiring mediation in the arbitration clause avoids the stigma of "weakness" that the uninformed often attach to the first party who suggests mediation.

iii. I have found step clauses to be particularly useful in business disputes. A step clause forces logic on the parties by requiring them to work together to try to resolve the dispute on a mutually agreeable (or some would say mutually "disagreeable") basis before turning loose the litigators.

iv. If step clauses are not carefully drafted they can be used as a vehicle for delay and can result in required but meaningless negotiations where one or more of the parties has no real interest in moving toward a settlement.

1. Also, it should be made clear that each preliminary step is intended as a condition to be satisfied before the arbitration process can be commenced, and not a mere suggestion; failure to make this clear could lead to litigation.

D. ***Sample Dispute Resolution Clause.*** Included with this outline is a sample dispute resolution clause that provides for mandatory negotiation followed by mediation and arbitration.