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**UNDERSTANDING WHY LAWYERS RESIST
MEDIATION**

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UNDERSTANDING WHY LAWYERS RESIST MEDIATION

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Humans possess impressive abilities to develop novel and complex ways to conflict and dispute with each other but face a limited menu of options for resolving these disagreements. The conflict and dispute resolution options available across the world include: (1) avoiding them; (2) consensually settling them by negotiating or mediating; (3) using an outsider to decide resolutions of them by litigating or arbitrating; and (4) using coercion, force, and, violence. Avoiding is the option chosen most around the globe. Negotiating is used next most frequently and adjudicating follows it. Regrettably, resort to coercion, force, and violence is employed too often and probably comes next in terms of frequency of use. Mediating through the use of uninvolved persons who assist and enhance negotiation is an integral part of many cultural traditions in Africa, Asia, and Latin America. Outside these contexts, however, this valuable option is probably used least.

In recent decades mediation has increasingly been adapted to court systems for use in conflicts and disputes that might otherwise receive adjudication. Mediation programs connected to courts started emerging the United States in the 1980s. They quickly spread to Australia, Canada, and the United Kingdom, and evolved more slowly in countries in Western Europe, Africa, Asia, and Latin America. Although this evolution continues, many countries around the world have developed mediation options easily available to clients encountering conflicts and disputes that could be subjected to litigation or arbitration.

Studies show that many participants in these disputes recognize the advantages that mediation often affords over adjudication. For example, U.S. business executives believe that mediation helps resolve conflicts and disputes while preserving commercial relationships better than adjudication does. They believe that mediation produces outcomes in less time than is required for adjudication. They also believe that mediating is generally less expensive than litigating or arbitrating.

Despite these views, businesses do not mediate often. A survey of 609 U.S. companies showed that 19% mediate frequently. One hundred fifty-eight German companies surveyed believed that while mediation was generally beneficial, it was rarely used. Seventy French companies surveyed showed that 39% mediate commercial conflicts and disputes.

Consistent with these results, adjudication remains the most frequently used conflict and dispute resolution process in the United States, Europe, and Latin America. Litigation supplies the preferred method for resolving domestic disputes while arbitrating is the favored process for cross-border conflicts.

The primary constraint on broader use of available mediation mechanisms largely results from lawyers' resistance to using mediating. Obviously, not all lawyers resist mediation. Although many lawyers have contributed significantly to the development of court-connected mediation programs throughout the world, it appears that a majority of the globe's attorneys resist mediating. The greatest inhibitor of mediation use is the fact that lawyers often resist recommending the process to their clients. This resistance matters because lawyers in most countries either decide which option to employ to resolve conflicts and disputes, or recommend to their clients which approach to use.

Substantial evidence suggests that lawyers often either fail to mention mediating as an option or neglect to share a full comparison of the advantages and disadvantages of both adjudicating and mediating. One survey showed that U.S. lawyers did not mention mediation as an option in 70 pending commercial lawsuits. Sixty-eight percent of Italian companies surveyed reported that their lawyers did not encourage consideration of mediating as an alternative to litigating. A survey of 2300 Ohio lawyers showed that only 14% regularly recommended mediating to their clients, and 27% never suggested mediation. Several studies show that U.S. lawyers rarely mediate, with 17% in one study reporting they mediate often, usually, or always. Three years after Poland introduced mediation to its Civil Procedure Code, Polish lawyers continue to demonstrate reluctance to mediate conflicts and disputes.

This paper examines reasons why lawyers around the world resist mediating even when many clients understand and appreciate its frequent advantages over adjudicating. It briefly analyzes three groups of factors that explain this widespread resistance: (1) shared cultural traditions based on specialized knowledge and legal education; (2) compensation, control, and comfort dynamics; and (3) biases flowing from the ways humans brains perceive and make decisions. It ends by recommending that mediation program designers create mandatory rather than optional court-connected mediation programs to enable lawyers to experience the advantages that mediating brings over adjudicating in many instances.

1. SHARED CULTURAL TRADITIONS

Professions possess an abstract knowledge base, shared norms, and educational experiences that derive from and reinforce this core knowledge. Despite broad variations and differences around the world regarding law's source and development, lawyers everywhere share norms and educational experiences linked to law, legal doctrines, and procedural rules. These norms and educational experiences emphasize a rights and remedies framework for resolving conflicts and disputes peacefully through adjudication. It generates universal lawyer tendencies to assume that resolution should occur by applying legal rules to fact situations embedded in conflicts and disputes. These tendencies encourage lawyers to perceive through law-based, rights-oriented lenses and this powerfully influences actions when they gather and give information during client conversations.

Basing perception on legal rules and rights helps lawyers everywhere translate complex, multi-factor situations into manageable frames for adjudication. While invaluable, this perception is selective because it emphasizes some things and excludes others. For example, in conflicts and disputes, this selective perception emphasizes gathering information about legally authorized remedies, legal and factual elements which substantiate or refute these rights, proof and evidence issues, important witnesses, essential documents, and monetary damage components. This selective perception also tends to exclude gathering information about interests, relational issues, and non-monetary considerations. It also de-emphasizes considerations such as reorienting disputants to each other, satisfying their emotional interests, and promoting mutual respect, affinity, and autonomy.

Lawyers across the world share legal cultural influences that emphasize traditional, conservative options and that do not easily embrace change. A human tendency to rely on familiar, traditional approaches is a status quo bias that appears to be heightened by embracing law as career. Law usually changes slowly after extensive legislative consideration in civil systems and judicial assessment in common law approaches. Legal rules provide structured frameworks that appeal to most lawyers. In addition, virtually all legal systems across the world have established formal adjudication approaches with clear rules that structure resolving conflicts and disputes within them. The methods for obtaining third-party decisions are clear and linear.

Lawyers around the world share legal education experiences that emphasize adjudication, not interest-based conflict and dispute resolution methods possible in negotiating and mediating. The vast majority of legal education focuses on learning legal doctrines, principles, and procedures. Most law school curriculums require completing courses on how judicial adjudication operates. This overwhelming curricular emphasis communicates explicit and implicit messages that adjudication works best to resolve conflicts and disputes peacefully.

Most legal education curriculums across the world offer few or no opportunities to learn skills and values beyond the substantive content of law and the analytical tasks involved in applying legal rules. Law schools in the U.S. devote 91% of their curriculums to learning law, adjudicatory procedure, and rule-based advocacy skills. They devote nine percent of their instructional time to learning and practice opportunities in interest-based negotiating, mediating, interviewing, counseling, and clinics where students serve real clients with actual problems. Although virtually all U.S. law schools now offer courses in negotiating or mediating, the small enrollments needed in these courses limits broad student access to them. Small enrollments are necessary in these courses to permit performance-based learning approaches. On average, 73% of American law students receive no learning opportunities emphasizing interest-based, non-adjudicative conflict and dispute resolution and problem-solving. Similar or worse curricular imbalances exist at most law schools elsewhere in the world.

2. COMPENSATION, CONTROL, AND COMFORT

Compensation dynamics significantly influence lawyer resistance to mediating. Helping clients resolve conflicts and disputes through litigating or arbitrating provides profitable activity for lawyers in most countries. Absent contexts which permit charging outcome percentages, most U.S. lawyers earn fees based on the hours spent preparing for and conducting adjudication. U.S. executives complain that hour-based fees create disincentives for lawyers to mediate. Many believe that hourly billing blocks early, inexpensive settlements, and encourages lawyers to work slowly and do more than is necessary. A 2009 study showed that mediating reduces the amount of time lawsuits require. Evaluating 15,000 non-criminal lawsuits handled by salaried Assistant U.S. Attorneys showed that mediating saved an average of 88 lawyer hours per case.

Twenty-five percent of U.S. lawyers surveyed admitted believing that increasing mediation would decrease their personal compensation. Similar economic concerns influence civil system lawyers in other parts of the world who do not use or depend on hourly billing. Latin American attorneys expressed concern that adjudicating pays but mediating does not. Fear of lost income from increased mediating has generated lawyer resistance to mediation in Denmark, Italy, and Scotland. A primary challenge to implementing the EU directive to mediate all cross border disputes is to make mediating financially attractive to lawyers.

Existing statutory compensation schemes in many countries often create disincentives to mediate. For example, some mandatory or advisory fee schedules may not include mediating making it harder for lawyers to get paid for this work. Germany has a system where legal costs insurance pays for adjudicating but not mediating. The Italian fee structure is based primarily on the number of briefs and hearings held and mediating requires neither.

ADR [alternative dispute resolution] by mediating does need not to connote alarming drop in revenue for lawyers. Although this may require amending existing statutory compensation schemes, lawyers should receive compensation for preparing for and participating in mediation. They also should be allowed to develop value-based outcome-oriented and similar bonus approaches that reward them for achieving timely, effective, high-quality solutions by mediating.

Lawyers generally enjoy feeling in control and central to the work involved in resolving conflicts and disputes. Adjudicating in most countries lets lawyers exercise control, play dominant roles, and remain central to the endeavor until external decision-makers act. Lawyers generally prefer leading to following, and adjudicating requires their leadership in pleading claims and defenses, assembling relevant evidence, and presenting written and oral arguments. In many countries, lawyers enjoy monopoly status as the persons permitted to represent clients in adjudication. Adjudicating requires lawyers to use their hard-earned knowledge of the law and their abilities to apply this expertise persuading decision-makers.

Clients typically defer to their knowledge and expertise in these realms and let their attorneys control and lead when adjudicating.

Mediating reduces lawyer control. It substitutes a focus on interests and problem solutions for an emphasis on law, evidence, and legal argument. While lawyers use their legal knowledge to analyze case strengths, weaknesses, and likely outcomes in the event no agreement is reached, mediating provides lawyers no opportunities to engage in extensive persuasion applying their expertise. It lessens lawyers' law-based expertise by integrating consideration of non-monetary and other interests outside legal frames, de-emphasizing determinations regarding applicable law, and seeking outcomes based on decisions regarding costs, benefits, and risks.

Mediating brings a less formal consensual process where clients attend and participate. If done well, mediation provides opportunities for clients to talk and to listen in joint sessions when all disputants meet together, and in confidential meetings conducted outside the presence of all or some participants. Mediating reduces lawyer control by providing clients opportunities to hear their counterparts' perspectives without distortion from their attorneys, interact directly with their counterparts, and make informed judgments comparing mediation options and likely adjudication outcomes.

Finally, people like to act within their knowledge- and experience-based comfort zones. They often resist performing actions that present more challenge and less comfort. U.S. attorneys typically have personality tendencies which encourage abstract, objective, and impersonal approaches to problems that match adjudicating well but may not work effectively in the applied, subjective, and person-oriented contexts mediating presents. Presumably most of the world's lawyers, like those in the U.S., receive little or no instruction in identifying and responding to human emotions effectively. These are essential tasks in approaching mediation counterparts and helping clients prepare for and participate in mediating. Actions that generate negative, hostile emotions divert attention from resolution and damage relationships. Actions that foster positive emotions, on the other hand, promote resolution and enhance relationships. U.S. lawyers need education and experience in how to listen, empathize, and navigate through strong emotional moments effectively in order to feel more comfortable mediating.

Change is never easy, and it often generates fears of making mistakes and receiving negative judgments from clients and colleagues. Lawyers should ensure that they do not reject mediation because it changes process resolution dynamics and thereby gives them less control, centrality, leadership, and opportunities to use legal knowledge-based advocacy. They also should resist inclinations to avoid mediation because it puts them outside their comfort zone when confronting the complicated, interactive emotional dynamics that often occur while mediating.

3. BIASED BRAIN-BASED PERCEPTUAL PROCESSES

All decisions and actions involved in identifying, recommending, and implementing conflict and dispute resolution options, like all human choice and behavior, starts with perception. Humans perceive through their sensory receptors facilitating sight, sound, touch, smell, and taste. Meanings derived from these perceptions influence decisions, actions, and predictions. Neuroscience recently demonstrated that humans form these meanings largely as the result of internal emotional brain reactions.

Wide agreement exists that human brains essentially use two different decision-making methods: a conscious, logical slow process of thinking through perceptions and alternatives using the prefrontal cortex and a quicker, entirely emotion-based neural system that operates largely below the surface of consciousness. Although the cognitive, deliberative brain gets virtually all of the attention in decision-making theories, most of what humans think and do is really driven by this second, entirely emotion-based system. Human brains constantly send and interpret neural impulses regarding threat, safety, like, don't like, and many other essentially emotional messages. Many, if not most, human decisions and actions are driven by these quick, effortless, emotional brain responses.

Lawyers across the world believe that their analyses, predictions, and decisions are rational. Substantial neuroscience evidence, however, suggests that this belief is not accurate. Many identifiable emotional factors frequently distort rational decision-making. Many occur as the result of how rapid, subconscious emotional brain systems perceive, interpret, and respond to information. Many others result from neural shortcuts brains use when working with complex situations including the decisions needed to identify, evaluate, and use conflict and dispute resolution methods. Humans also are more likely to use emotional brain-based perceptions and neural shortcuts when confronting uncertain situations, and virtually all conflicts and disputes, at least initially, generate substantial uncertainty.

Occurring rapidly and largely outside conscious awareness, these emotional brain-based decision-making patterns and neural shortcuts are difficult to detect and counter. Although these responses usually work well, they occasionally misfire for specific, consistent reasons. These misfires often cause biased, ineffective, and non-optimal decisions and actions. Many misfires occur when confronting and resolving conflicts and disputes, and several influence choosing adjudicating over mediating.

To manage the overwhelming amount of external stimuli that human brains confront, people perceive selectively in potentially biased ways. They notice and emphasize some aspects of events and situations and ignore others. Everyone selects, organizes, and evaluates external stimuli in unique ways so persons often interpret the same events and situations very differently.

Perception is influenced by what people have learned and experienced. Lawyers the world over have learned that conflicts and disputes should be resolved by adjudicating and

presumably many also have experienced aspects of adjudication. This influences them when interviewing clients and assessing conflict or dispute resolution approaches to selectively perceive the aspects of situation that relate to adjudicatory resolution, usually remedy-relevant facts. It also encourages them to ignore or deemphasize interests, relationship concerns, and non win-lose solution options which supply the core of successful mediating but have little resonance in adjudicating.

Selective perception reflects tendencies to perceive in self-serving, egocentric ways that reflect an individual's knowledge, experience, and interests. Assuming that they are objective and reasonable, humans also assume that others looking at the same events and situations draw the same conclusions they do. The often attribute unreasonable or harmful motives to those who draw different conclusions.

When differences arise, humans tend to believe they have perceived all important data even though our brains routinely take in only small slices of information, possibly as little as 1% of a stimulus field in some situations. Based on this biased belief, people then look for more information that justifies their perspectives while ignoring other stimuli. This process mirrors adjudicating which travels on claims that rely on some but not all potentially useful data in conflict and dispute situations.

Biased human perception risks multiply when conflict and dispute dynamics generate partisan perception. Most conflicts and disputes generate intense emotional and partisan responses in the persons involved in them. They generate anger, distrust, and interests in self-preservation, and these strong emotions influence choosing a dispute resolution method. Powerful feelings of suspicion, betrayal, and disrespect influence desires to achieve vindication and to punish disputing counterparts. These emotions influence choosing adjudicating for the vindication of winning, and the opportunity to punish others by inflicting economic and psychological harm on them.

These strong partisan responses also harden commitments to existing beliefs and further narrow information gathering. Partisan perception reinforces tendencies to seek only information supporting existing views, to ignore or discount data that disconfirms them, and to resist changing these perspectives even when confronted with inconsistent information.

Incomplete and distorted selective and partisan perception breeds additional biases resulting from egocentric optimistic overconfidence. This overconfidence leads humans to discount small probabilities, assume luck is usually favorable, and discount unattractive consequences. It also encourages biasing predictions in self-serving ways that reflect preexisting beliefs. Many biased predictions by lawyers involve overconfidently forecasting adjudicating outcomes. U.S. lawyers in one study rated themselves in the 80th percentile of all lawyers on their abilities to predict litigation outcomes successfully. These biased, overconfident, and inaccurate predictions often influence lawyers to recommend adjudicating.

The narrowed perception influenced by selective perception, combined with and intensified by partisan perception, often creates assumptions that what disputants value in conflicts is limited and diametrically opposed. Called the fixed pie and zero sum biases, these assumptions reflect human assumptions that humans when conflicting or disputing always want only the same things and always value these items the same way. Applying these assumptions means that one disputant's gain is inevitably another participant's loss. Law's tendencies in both common and civil law traditions to measure rights and remedies in only monetary terms reinforce these assumptions. Fixed pie and zero sum biases influence common law and civil system lawyers to recommend adjudicating because it conflates all interests into either-or claims where winners get everything they seek.

Distorted selective perception, fixed pie and zero sum biases, and egocentric optimistic overconfidence combine to activate a powerful, emotion-based brain habit: loss aversion. Loss aversion motivates humans to avoid everything that feels like loss. Research consistently shows that people are more motivated to avoid losses than to achieve gains. This strong emotion-brain based habit often shapes human decisions. It usually influences decisions that attribute more weight to avoiding loss than to achieving gain. Loss aversion is an innate emotion-based flaw in human brains. Everyone who experiences emotion is vulnerable to its influences.

Humans tend to assess losses or gains in relation to anchoring reference points that they assume, often incorrectly, are neutral. Adjudicating outcomes usually provide the anchoring references lawyers use in choosing what method to recommend or employ to resolve conflicts or disputes. Anchoring decisions this way compares optimistically overconfident adjudicating forecasts of winning everything sought against uncertain mediation outcomes which usually require scaling back from what victorious litigating or arbitrating produces. These comparisons explain why many lawyers fear that mediating reduces gain and often negatively associate mediation with making concessions. It also explains why many attorneys believe that mediation is merely a euphemism for getting less money.

Lawyers throughout the world commonly experience all of these entirely predictable emotional brain-based responses and neural shortcuts. So do many, if not most, of their clients when conflicts and disputes ripen into situations bringing them to attorneys. These responses and shortcuts frequently combine and reinforce each other to produce a powerful and pervasive win-lose mindset. This mindset produces actions that frame all conflict and dispute resolution activities as requiring actions to maximize gain.

This win-lose mindset encourages adjudicating and produces substantial resistance to mediating. U.S. lawyers usually approach conflict- and dispute-resolving with this win-lose mindset. They use it during resulting interactions, and resist information that disconfirms its appropriateness. Surveys show pervasive use of gain-maximizing behaviors motivated by a win-lose mindset by U.S. lawyers negotiating and settling conflicts and disputes. One survey of 515 lawyers and judges revealed that 71% of the matters in which they

participated were resolved by win-lose negotiating. Sixty-seven percent of lawyers in another study indicated that they primarily sought to maximize gain when negotiating.

Any one of these biased emotion brain-based perceptual processes and decision-making short cuts is sufficient to influence lawyers that they should adjudicate conflicts and disputes. These processes and short cuts interact and combine, however, to produce powerful cumulative influence toward adjudicating and away from mediating. Consequently, most U.S. lawyers, and probably a majority of attorneys elsewhere in the world, almost automatically perceive adjudication as the fallback option to use if non-mediated negotiation fails. They also usually hold this perception without full awareness of the potential advantages mediating brings.

4. CONCLUSION: MANDATING MEDIATION

This large menu of emotional brain- and neural short cut- based biases, combined with powerful legal cultural influences and compensation, control, and comfort complications, substantially explains why lawyers around the world resist mediating conflicts and disputes. Research shows that attorneys who participate in mediation done by skilled mediators value it more than who have not experienced the process. It also shows that these experiences frequently encourage attorneys to consider mediating as an initial option before adjudicating, and to recommend this to clients and colleagues. This suggests that a useful way to counter this widespread resistance is to design systemic approaches that encourage lawyers to experience mediating.

Some commercial matters are mediated pursuant to contractual dispute resolution clauses mandating it. For other conflicts and disputes, judicial systems in the U.S. began developing court-connected mediation programs in the early 1980s by encouraging or authorizing referrals of divorce and family matters to mediation programs. Then they quickly extended this option to other types of litigation.

Early experiences with these programs showed that simply encouraging mediation did not work because lawyers resisted these invitations for all the foregoing reasons. Malaysia did not have much success with an approach providing simply judicial encouragement to mediate. In Peru, a judicial requirement that lawyers discuss mediating produced phone calls from attorneys consisting of leading questions, like “you agree that mediating this case makes no sense;” and even shorter “yes” answers.

The solution to this problem is to mandate mediating. In 1987, Florida became the first U.S. state to mandate mediating broadly across its non-criminal judicial docket. Since then, any contested issue is likely to receive a court order to mediate before the litigation is scheduled for trial. This order requires that attorneys and parties with full authority to settle must convene a mediation to discuss resolution of all contested issues. They do not have to negotiate but they do have to attend. Data suggests that between 55 to 75% of cases

mandated to mediate in Florida settle at this mediation, and that building on progress made mediating, a vast majority of those that did not reach agreement resolve shortly afterwards.

Twenty-two U.S. states have followed this model pioneered in Florida, and several additional states have different approaches to mandating mediation before taking filed law suits to trial. More than twenty-five years of experience has helped most Florida lawyers forget that they once held skeptical views about mediating because they have learned how it assists and enhances negotiating. Anecdotal evidence suggests that voluntary pre-suit mediations are increasing in Florida as a result of lawyers experiencing mediation's value.

In addition, nearly all U.S. federal district courts have mediation programs and most of them are mandatory. Court-mandated mediation programs in Australia, Canada, and the United Kingdom have increased lawyer familiarity with and use of mediating. Countries in Africa and Europe have moved in similar directions. Poland replaced an optional with a mandatory mediation provision for commercial matters. Argentina developed a successful mandatory program in the mid-1990s that still runs very successfully.

One or two experiences mediating with skilled neutrals helps many lawyers understand that they do not know or understand everything relevant to analyzing and forecasting adjudicating outcomes accurately before mediation. These experiences also help lawyers learn that selective and partisan perception lessens their analytic objectivity and increases risks of optimistically overconfident, biased predictions. Mediating helps attorneys learn more about their case weaknesses and their counterparts' perspectives, and this helps them assist their clients to make better cost-benefit decisions when comparing possible mediating outcomes to revised and more accurate adjudication forecasts.

Lawyers usually experience how confidential, private meetings with skilled mediators generate information that would never appear in adjudicating but often proves crucial to resolutions. This may help lawyers understand how skilled mediators counter fixed pie and zero sum biases by expanding resolution agendas to include interests and relief that courts usually cannot provide, such as apologies, barter arrangements, and future connections. This also helps lawyers avoid common negotiating errors stemming from misunderstanding important facts, legal rules, and possible agreement terms.

Experiences with skilled mediators may help lawyers learn how mediating often counters the distortions caused by partisan perception and defuses participants' hostility. Effective mediators frequently respond to core emotional concerns by expressing appreciation, building affiliation, respecting autonomy, and acknowledging status. They introduce light where before there was only heat by acknowledging without judgment strong emotions that disputants express. Usually done in caucuses, recognizing and acknowledging strong emotions communicates respect. It allows participants to vent and often discharge these feelings temporarily enabling them to move to resolution-oriented conversations. It also often generates useful information that clarifies interests and aids careful cost-benefit analyses comparing mediating and adjudicating risks, costs, and likely outcomes. Observing

mediators model these critical skills may help attorneys manage their discomfort confronting the fluid emotional dynamics in mediated negotiations.

Mandating mediating experiences may help lawyers see that it builds on rather than supplants their existing skills in analyzing fact situations and estimating adjudicating outcomes. Although it shifts frames from winning to problem-solving, mediating gives lawyers important roles in helping their clients develop, compare, and choose between the best options developed in mediation and initiating or continuing litigation or arbitration. Finally, mediating lets attorneys satisfy human impulses for resolution, for healing individuals and organizations, and for enabling life to function more harmoniously and productively.

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