

IMPROVISATIONAL NEGOTIATION

A Mediator's Stories of
Conflict About Love, Money,
Anger—and the Strategies
That Resolved Them

Jeffrey Krivis

Foreword by Jim Melamed

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More Praise for *Improvisational Negotiation*

“Jeff is a mediator who cares deeply about his craft, and every page of this book shows it. It deserves to be read by all professional mediators who aspire to his level of excellence, by lawyers who advise clients in the mediation process, and also by students of human nature. His stories are full of warmth and the characters skillfully drawn. The insights into negotiation theory are profound.”

—Tony Willis, Brick Court Chambers, London, England

“The reason this book is so important is because it allows the reader to feel and sense what the mediation of conflict is really about. Beyond technique, at core, the success of a mediator is his or her authenticity—that’s not necessarily the same as honesty and goes beyond mere empathy—it is the ability to connect and develop an essential level of trust with the parties. That’s why Krivis has been so successful in his mediation practice and it’s what permeates through his words and stories. Every mediator, novice or advanced, practicing in any area of conflict management, would reap great benefit from reading this book.”

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“All conflicts are an alchemy of strong emotions, deep hurts, great perils. Always, there is the prospect of finding something bigger and transformational around the corner if we can find our way through it. Krivis shows us the way. A skilled mediator and master communicator, he demonstrates the patient power of story as a strategy for overcoming anger, pain, and sadness. More important, he renews hope that all of us can do the same when we are dealing with our own problems or helping others with theirs.”

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“*Improvisational Negotiation* is a must-read for all mediators. Jeff Krivis, a world-class mediator, brings the reader into the conference room and provides amazing insights that are both practical and useful. This

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“Jeff Krivis has once again demonstrated why he is one of the premier mediators in the world by writing an easy-to-read yet sophisticated treatment of what actually happens in mediation. The post-story sections of ‘What Happened?’ and ‘What Strategies Can We Learn?’ are helpful for practitioners from the novice to the master levels. The conversational tone, rather than a research approach with footnotes and case authority, is refreshing yet is still an invaluable way of telling the mediator’s story!”

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“This is a valuable and accessible resource for anyone interested in knowing about commercial mediation. And it is fun to read.”

—Arlen Gregorio, Gregorio, Haldeman & Piazza, Mediated
Negotiations

“Without compromising the mystical interaction of human touch with high skill, Krivis delivers a treasure trove of methods to discover the ‘art of the deal.’”

—Tracy Allen, trainer and private mediator

“Jeff Krivis’s stories of masterful mediation are perfect for promoting the kind of moment-to-moment creativity that characterizes the great mediators—and the great jazz musicians. For mediators at any stage of their careers, *Improvisational Negotiation* is a treasure of illustration, illumination, and inspiration.”


—Leonard L. Riskin, C. A. Leedy Professor of Law, University of
Missouri-Columbia School of Law; director, Center for the Study of
Dispute Resolution

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FOREWORD

I first met Jeff Krivis nearly fifteen years ago. For the first couple of years, our relationship was exclusively online. Jeff was jkrivis@igc.org, and I was jmelamed@igc.org. We both had my cofounder at Mediate.com, John Helie, to thank for having set up the ConflictNet network that allowed so many in the conflict resolution field to initially meet. In the era of 9,600-baud modems, text only, and monochrome monitors, we exchanged information about getting our mediation practices going, about legal and policy issues, and about ways to expand the field of mediation. Jeff was one of the first to recognize that we needed to develop a mediation industry.

When I finally met Jeff in person in the early 1990s at a Southern California Mediation Association (SCMA) conference in Malibu, I remember thinking, “He’s not as imposing as I’d imagined.” We developed an immediate rapport. From our first meeting, I have always enjoyed looking Jeff in the eyes and listening to his thoughts on “taking the next steps” and “making a bigger difference.” I remember Jeff saying that “small things can make a big difference” years before the publication of *The Tipping Point*.

Jeff has contributed mightily to the field of mediation. At our first meeting in Malibu, I remember Jeff being honored as the outgoing SCMA president. SCMA was in the middle of a substantial growth spurt, in great part due to Jeff’s leadership. When it came to the formal honoring ceremony, most of the discussion revolved around Jeff’s love of baseball. Jeff was relaxed and not out to impress, and he offered himself with humor and humility. Jeff’s lack of pretense was noticeable.

Over the years, Jeff went on to become one of the founders and an early president of the International Academy of Mediators (IAM), a group of approximately two hundred elite civil and commercial mediators. Jeff’s dominant interest with IAM was to elevate mediator education and collegiality. Whether online or at SCMA

or IAM, I have regularly seen Jeff pushing the envelope. Jeff has been an outside-the-box thinker and entrepreneur in a field that, paradoxically, is perhaps too often conflict averse if not downright conservative. Mediators tend not to want to rock the boat too much. We tend to seek calmer waters. Jeff offers a huge service to our field by insisting that we mediators rock our boats and ask ourselves whether we might bring benefit to all waters, calm and raging.

A simple review of Jeff's nearly two dozen articles on Mediate.com reveals his activism and openness of thought. Here are a few sample article titles: "Stand-Up Comedy: Lessons for Mediators"; "Preventing the Death of Mediation"; "The Truth About Deception in Mediation"; and "The End of the Cold War: The Marriage of Mediation and the Court System." In a refreshingly honest and clear way, Jeff asks the hard questions, challenging each of us to be at our best.

I am now coming to understand how my personal relationship with Jeff mirrors many of Jeff's other professional relationships and his mediation work generally. Jeff is a creative thinker and motivator. He is a catalyst and communicator of imaginative solutions. Jeff brings this spirit and capability wherever he goes.

Most noteworthy are his flexibility and transparency, his insights and imagination. Through his stories, he helps us explore his treasure chest of techniques and approaches. This is really valuable stuff for mediators! No matter how experienced we may be (or think we are), the navigational tools that Jeff offers in *Improvisational Negotiation* are of immense value as we head into the storm. More important than any of Jeff's specific techniques is the multi-dimensional awareness that he describes and offers. His is an intuitive and eclectic approach, assisting parties in most capably resolving their unique differences.

Whether offering services in the mediation room or reviewing our new online mediation technology, Jeff recognizes the many dimensions of conflict: substantive, relational, and psychological. He is open to any and all new approaches, with only one requirement: that the approach works. Jeff operates beyond any designated style of mediation practice (evaluative, facilitative, transformational, problem solving, narrative . . .), always asking himself, "What will work here and now?" Then he acts on his intuition with confidence and purpose. Perhaps the most important

thing we can learn from Jeff is to trust our instincts in our own mediation work and not to be afraid to take risks. Surely it is worth reading all the books and taking all the courses, but mediation work is so complex, so human, and so fraught with variables that there simply is no linear recipe for success. What Jeff so capably demonstrates is that we are at our best in performing our noble work as mediators when we are genuine, imaginative, and self-trusting. Through our creativity and resourcefulness, we stimulate those around us to be at their best.

So thank you, Jeff, for your personal friendship and even more for bringing your creativity, thoughtfulness, and energy to the field of mediation. Although there is surely no simple recipe for success in mediation, in *Improvisational Negotiation* you have given mediators and conflict resolution professionals a unique and valuable opportunity to experience how your mind and heart work as you place yourself at the center of heated battles. Thank you for your authenticity and for modeling mediation at its best, both in and beyond the mediation room.

Jim Melamed
CEO, Mediate.com
Eugene, Oregon

For Amy, Hannah, and Rachel

IMPROVISATIONAL NEGOTIATION

INTRODUCTION

As a young trial lawyer, I learned early on that there's nothing like a good story to get your point across simply, effectively, and memorably. When I made the transition into mediation full-time, the importance of the story in my daily work soon became strikingly clear. The narrative of a case can be elusive, changing according to the point of view of each party. Often, if I simply gave both sides in the negotiation the opportunity to tell me their story, and made sure they felt listened to and heard, I had an excellent chance of helping them break the deadlock that had brought them to my office in the first place. In other cases, I found that the crucial factor was the *timing* of the stories about my own experiences that I would share during the meetings. In every case, however, it became clear that my role as mediator made me the person in charge of shaping the negotiation's narrative so that it reached the happy ending all parties hoped for: settlement.

Mediators must follow the law, of course, and must strive to be ethical. But beyond that, there are no set rules. Reaching settlement is the goal. How you get there is up to you. Each new day presents a new case, a new set of parties, and a unique combination of factors. I wake up knowing that I will have to take these various factors into account, direct the flow of the negotiation toward settlement, be prepared for the unexpected, and deal with it. With thousands of mediations under my belt, and after teaching countless seminars and workshops, I know one thing for sure: when it comes to negotiation, we all have to use our improvisational skills to make deals happen. This is why the power of the story is so compelling, and why *Improvisational Negotiation* skips the long discussions of philosophy and the step-by-step programs found in other books and goes straight to the point: telling entertaining true stories that show a mediator using the skills and tools of the trade to

direct a successful negotiation. Most of these tales are taken from my own experience; others I have gratefully borrowed from friends and students. In all cases the names (and sometimes the genders) have been changed to protect the privacy of the parties, but all of the stories happened pretty much the way I tell them here.

Being a mediator is a great job. I love waking up in the morning, knowing that anything might happen during my day at work. I mediate a wide variety of cases—from class action and mass torts to entertainment to insurance, business, and catastrophic injury—and I teach mediation workshops as an adjunct professor of law at the Straus Institute for Dispute Resolution at Pepperdine University. I have learned from experience that no two stories are the same. Still, I have found that most revolve around one of two issues: personal relationships or money.

Some negotiations are over relatively quickly, but many continue for hours and hours—and hours. My work doesn't leave me as much free time as I'd like, and I'm betting yours doesn't either. That's why I've kept these thirty stories short and to the point. Life is messy—often it's up to the mediator to clean up. And just as life conflicts don't always fall neatly into categories, the cases you deal with every day cover a lot of ground. One case may be about repairing communications, a second may involve parties who have strategic incentives for using information to achieve a better deal, a third may be strictly about finding ways to split the financial pie. Some cases may involve all these factors, and any one of them may require you to come up with a creative solution on the fly. To make it easy for you to learn, the stories are organized into three categories. The stories in Part One are about rebuilding communication breakdowns and healing broken relationships. The stories in Part Two may involve relationships, but they are concerned more with financial negotiations, finding other kinds of value, and parties who are likely to have strategic incentives for using information to achieve a better deal. The stories in Part Three offer some useful and proven techniques that can get you through knotty technical negotiations. Each story is capped by a deeper exploration of what the mediator did (or might have done better) to reach a successful conclusion, and a brief discussion of the specific strategies highlighted in the case. Finally, for quick reference, Part Four is a brief guide to advanced techniques that you can use to quickly shift

the energy when a negotiation is locked down (or to prevent it from getting locked down).

Do I expect you to follow these stories slavishly? Of course not! No two mediators work the same way, and no two cases are the same. In fact, mediators need to change their approach not only from case to case but also *within* the same case, as many of the stories in this book make clear. That's one of the things that makes being a mediator such an interesting profession. Every mediation is a fresh challenge. With your tools and skills and wits about you, you just jump into the center of the conflict and try to bring it to a successful conclusion. Hockey great Wayne Gretzky used to say that he liked to skate to where the puck is going, not to where it has been. I hope the stories in this book encourage you to follow a similar path: to search the length and width of the field, anticipating the direction of the case, constantly maneuvering the parties toward the deal.

ACKNOWLEDGMENTS

Each day my work brings out a variety of responses from people, ranging from utter helplessness to a gentle calm. At the conclusion of some days, I am lucky enough to feel as though I've received a standing ovation from the parties, which I attribute to an appreciation of the mediation process. It is with this in mind that I humbly turn the tables to salute and offer my own standing ovation to the many people who have supported my work over the years and who have contributed to this book.

Without the vision of my editor, Alan Rinzler, this book might never have been born. He worked with me tirelessly to shape and encourage the manuscript through every phase of the process, from idea to finished product. His old-school ethic and sixties' spirit helped shape my thinking tremendously.

Not surprisingly, I am indebted to several women who have shone a bright light around me personally and professionally, and without whom this book would never have been realized. Naomi Lucks, an editor extraordinaire, was my shadow for several months, taking my random thoughts and concepts and helping me frame sentences and narrative that came to life. Mariam Zadeh, my friend and student, allowed me to serve as her mentor but has been more

of a mentor to me on this project and many more. Christine Goedert, who has artfully kept my practice moving forward for many years, laid the foundation for many of the cases in this book. Last but not least is my wife, Amy, an incredible editor in her own right and a true collaborator in every way.

Many of my good friends in the mediation community and members of the International Academy of Mediators submitted story ideas, for which I am grateful. Unfortunately I couldn't use them all. There are a few special people whose own experiences and inspirational stories were included in this book: Cliff Hendler, Jay Rudolph, Bob Creo, Judy Meyer, Pat Coughlan, Deborah Rothman, and Mike Young.

Finally, much of this work has been inspired by my friends, colleagues, and students at the Straus Institute for Dispute Resolution at Pepperdine Law School, with whom I have enjoyed a wonderful relationship.

Jeffrey Kravis
Los Angeles, California

PART ONE

HUMAN V. HUMAN

Healing Relationships

CHAPTER ONE

INDEPENDENCE DAY

When Dan was suddenly fired from his job as a systems analyst “due to a reduction in workforce,” he felt as if he’d been kicked in the stomach. He had worked at the high-tech firm Expantec for more than ten years—from the very beginning of the company. But for Dan, this was more than a good job: he thought of his coworkers as his family. Now he felt that he’d been betrayed and abandoned by that family, and he was ready to go to court for wrongful termination.

Before the case went to trial, however, the court encouraged both sides to try mediation. Now the parties found themselves staring at each other across the polished expanse of a green marble conference table in the office of a downtown law firm, wondering what went wrong. Although they had an outside mediator, they agreed to meet in the offices of Expantec’s law firm because it was more convenient for Dan and offered all the room they would need. Settling into the dark red leather chair, and taking in the opulent scene, however, Dan began to wonder if he’d put himself at a disadvantage by coming into the “enemy’s” camp.

On the other side of the table, the company’s three representatives looked pretty comfortable. Bill, Dan’s ex-boss and old friend (he’d thought), Expantec’s corporate attorney, and the head of human resources were huddled together, probably discussing strategy. Displayed prominently in front of them was a laptop and projector for the PowerPoint presentation they’d prepared to detail Dan’s supposed failings in the workplace.

Dan got tired of waiting for the meeting to start, took out his cell phone, and called his fiancée, Jennifer. He wished she were there with him now.

The Mediator sized up the young man sitting rigidly in his chair. His buzz cut, tightly knotted tie, and buttoned-up suit gave Dan a military look that was somewhat incongruous in the high-tech world. *I wonder if he has many friends*, the Mediator thought.

As soon as Dan got off the phone, the Mediator explained that they would begin by making their opening statements. This would give them a base from which to proceed.

Dan's lawyer was blunt: "We intend to make Expantec pay for firing my client. They didn't fire him because of a 'reduction in force.' This was nothing less than a cold and calculated effort to ruin a life's work."

Dan nodded vigorously in agreement. "That's right," he said, looking fixedly at Bill. "If only they had talked to me first, I would have been able to do things differently before I was let go."

Dan's clear anger, and the anger behind his lawyer's message, took Bill by surprise. Until this moment he had not realized the lawsuit was personal. Ex-employees had taken him to court before. It was almost expected.

Expantec's attorney explained that they had planned an extensive presentation, including a computerized summary of the case presented by a large accounting firm, intending to prove statistical support for their reduction in force. They intended to back it up with aggressive legal support by the litigation team, confirming Expantec's right to lay Dan off.

The Mediator, sensing Dan's fragile emotional state, was concerned about the impact this presentation would have on the settlement discussions. He knew it would be a potential minefield if the mediation went forward with this agenda, so he called a timeout to talk to the parties. First, he wanted to learn more about how Dan perceived his relationship to the company. In today's volatile economy, high-tech employees were let go all the time. Why was he taking this so hard?



As the Expantec team went to get coffee, the Mediator turned to Dan and his lawyer. "Let's go outside for few minutes and get some air. I'm curious about a few things, and maybe you can clue me in." They sat down on a stone bench under some trees in the courtyard

of the office complex, and the Mediator began. "Dan, I'm trying to understand where you're coming from here. Can you tell me a little bit more about yourself and your work?"

"I loved my job," Dan said simply. "I helped get that business up and running, and I helped it grow. Over the years they gave me more and more responsibility, and I never let them down." Dan's jaw muscles tensed reflexively as he tried to hold back his tears. "The last ten years have been amazing. I would actually wake up every morning excited about going to work. In fact, sometimes I would sleep at the office in order to get a quick start on a project."

"And when you were let go? How did you feel?" asked the Mediator.

"Like they had abandoned me. They hung me out to dry!" Now Dan was shaking. "Why does this keep happening to me? I know I'm good at my work. What have I done to deserve this kind of treatment?"

The Mediator felt that Dan's reaction was a little extreme. There must be something else going on here, beyond the job itself. "I'm puzzled," he said. "What do you mean, 'Why does this keep happening to me?' Your records don't show that you've been fired from other jobs. In fact, you have a stable work record."

Dan looked down at the ground as he spoke, his voice suddenly quiet and matter-of-fact. "My mother died when I was five, and my father disappeared. He never called, he never wrote. For all I know he's dead. If he's not, he might as well be." Dan had been shuttled from one foster home to another, raised by people who cared more about the money they got for his care than for him. When he turned eighteen, the state abandoned him too. He worked at a number of jobs to put himself through school, and soon after college he'd landed at Expantec. For the first time in his life he'd found himself surrounded by a group of people who laughed together, played together, and worked hard for a common goal. He'd grown to adulthood at Expantec, and it had been great. Until now. Dan laughed sardonically. "You know what's really ironic? I'm getting married in a few months. Who am I going to invite to the wedding now?"

The Mediator was taken aback. Dan's coworkers were not only *like* his family; in his mind they *were* his family. He had no one else.

Dan was clearly wrung out, but he still held himself proudly. But the Mediator's new understanding of the depth of Dan's

anguish resonated deeply. This was more than the loss of a job; it was a personal rejection, a profound loss similar to what he'd experienced as a child. The Mediator now saw that honoring Dan's story would be paramount in a successful mediation. They'd already put in a few hours and the real negotiations hadn't even started yet. But what the Mediator had learned would shape the course of what would follow.

"Thanks for sharing your story with me, Dan; I know that must have been difficult for you. Take a few minutes to get yourself together, and let's go back in."



When they went back inside, the Mediator put Dan and his lawyer in a small office and went to have a private chat with the company's lawyers. "While I'm in there," he said to the lawyer, "you might want to talk to Dan about some of his options, and when I come back we'll discuss those."

The Mediator walked down the long hallway, the plush carpet muffling his footsteps. As he pushed open the door to the large conference room, he noticed that the Expantec team had turned on the laptop and projector and were waiting to get on with their presentation. Bad idea. "Look," he said, "I know you have a well-organized case. But if you make this type of presentation in front of Dan, it will likely sabotage this mediation before it gets started. Right now, Dan is emotionally invested in his case. Any evidence you provide is going to seem like an attack on him, and any attack is going to be counterproductive."

Expantec's lawyer was not ready to back down. "Dan's all wet here. We have proof that a reduction in force was necessary. If you look at the bottom-line numbers for Dan's department, you'll see that they were terrible."

"Numbers are only as good as the person who inputs them into the computer," responded the Mediator. "If you can verify them, then okay—I'll agree that Dan would have to admit there's been a problem. Do you have any support for those numbers?"

"Well," the lawyer admitted, "they're preliminary, but we believe they will be borne out as we get into the case." The Mediator could

see the group's disappointment. They really wanted to present their case. "I'll tell you what," the Mediator said. "Let's leave Dan out of this for the moment. Why don't you show me what you've got right now, and I'll see what I can do?" This would allow them to be heard and would also let the Mediator evaluate what kind of case they really had.

They all sat down and watched the presentation, which went on for some time but seemed to lack corroborating detail. When it was over, the Mediator thought hard. *I didn't see any numbers to back up their claim. What's the deal here? Did they really have a good financial basis for terminating Dan, or are they just trying to get rid of him because he was too expensive and they didn't like him as much as he liked them?* But when he spoke, he chose his words carefully. "Thank you. I really appreciate you showing me all the work you've done in preparation for this meeting. It seems to me from what I've just seen, though, that those statistics haven't been confirmed. Is that right?"

The team members looked at each and agreed that no, they hadn't been confirmed, but . . .

"If they haven't been confirmed," the Mediator continued, "then how could they be the basis of a decision to terminate Dan?" He let that thought hang in the air for moment. The skills he'd honed in his years as a litigator were coming in handy now.

"Do you suppose that Dan will argue that your motivation to lay him off was really financial because of his high salary?" The Expantec group exchanged glances.

"And if he makes that argument, what conclusion do you think the jury would come to? Is it possible the jury might be angry with you once they see his sterling performance record?" The Mediator looked at Expantec's attorney, waiting for his response.

"That's certainly possible," admitted the attorney. Now Dan's ex-employer, who had sat quietly through most of this exchange, was becoming alarmed. "Wait," he said. "Could we be exposed to liability if we can't verify the poor performance of Dan's department?"

"Well," said the Mediator, "your attorney knows as well as I do that trying to predict what a jury will do is like looking into a crystal ball to see the future. However, I would certainly want to know that there was sufficient documentary support for such a decision—especially in light of Dan's terrific personnel record.

Also, the fact that Dan was one of the most highly paid executives in the company will be presented as a motivating factor in the company's decision to dismiss him. Expantec is clearly saving a lot of money by letting Dan go." *Interesting*, thought the Mediator. *With as much time and energy as they had expended on putting this case together, they don't seem to have seriously considered this point.*

The Mediator felt they had enough food for thought. He decided to let the company stew while he returned to the small office to discuss the situation with Dan and his lawyer.



"Dan," he began, "I need to hear more about your relationship with your employer. Why do you feel things got to this point?"

"I don't know," Dan replied, clearly at a loss. "They never gave me any reason to think there was a problem. In fact, they just kept giving me more responsibility." He shook his head in angry bewilderment. "Expantec has been my family for ten years! To suddenly be told they don't want me anymore is beyond anything I can explain."

"Have you ever had the chance to discuss these thoughts with the company?"

"Not really. They just gave me the pink slip, had me box up my desk, and escorted me out the door. It was surreal. Ten years of work, and I was gone in ten minutes. The only person who really knows what I've gone through is my lawyer—and now you."

The Mediator could see that Dan felt he had been rejected without any explanation and had not had the chance to defend himself. He simply did not understand what led to the decision to fire him. The company line was not enough for him. After a solid seven hours of negotiation, Dan still felt utterly and inexplicably rejected. The Mediator also had some information that Dan didn't know about: the company reps were feeling just a little less sure of their position. Maybe they were just enough off balance now to listen to what Dan had to say. He decided it was time to get the two sides together to do the one thing they hadn't done: talk.

"Dan," he said, "here's what I think we need to do next. Let's get you and the company together so you can find out once and

for all what happened. Maybe the company will also appreciate that they need to think carefully about their position and try to come up with a settlement opportunity that has some teeth. I hope you'll feel comfortable telling them what the company meant to you."

Dan stared at the wall for a few moments, his jaw muscles working. Finally, he nodded his head and said, "Let's do it."

"Okay," said the Mediator. "Wait here for a few more minutes while I tell Expantec what's going on."



"What is this, a settlement negotiation or a group therapy session?" The idea of a meeting with Dan had clearly caught Bill off guard. Expantec had laid off several employees over the years, but nothing remotely like this had ever happened before. Then the human resources director, who had sat quietly beside Bill for the last few hours, spoke up.

"Look," she said, "let's just listen to what Dan has to say. Maybe we can figure out why this happened." Expantec's attorney agreed. This case might not be going the way they had planned. What did they have to lose by listening?

"Okay, okay," sighed Bill. "I give up. Bring them back here, and let's find out what the hell's going on."



Once again, both parties sat quietly around the marble table, waiting for someone to begin what promised to be an uncomfortable conversation.

The Mediator wanted to make sure that the power of Dan's narrative got through without putting Expantec on the defensive, so he began mildly. "Dan, from our brief conversations this morning, I've gleaned that Expantec was more to you than just a company to work for. Would you mind expanding on that a bit?"

Dan looked miserable but determined to soldier on. "The company has been my life," he said, looking directly at Bill. "They've

been my family, the air I breathe. I would have taken a bullet for them.” Bill was shocked. This was a little over the top. Dan had always seemed like such a one-pointed worker bee. Bill had no idea that all this emotion was just under the surface.

“What was it about your job that was so meaningful?” The Mediator gently nudged Dan into his story.

“A lot of things,” said Dan. “Knowing they’d be there for me every day, knowing they appreciated the work I did—a lot of things.”

“Can you give us an example?” the Mediator asked.

“Sure, okay. Having people say hello in the morning, or calling to make sure I was okay when I called in sick. Growing up as an orphan, I never had a Thanksgiving or a Christmas or any other holiday with my real family. Since coming here, to Expantec, I’ve come home. They always had cake for my birthday, every year. They’d take me out to lunch. Everybody would sign a card. Hell, most of my foster families never even knew it *was* my birthday!”

The room was dead silent. The Mediator thought, *Well, this can go two ways. Either Expantec jumps up and leaves right now, or they actually take in what Dan is saying.* The silence went on so long that he began to get worried, but he sat still and let Dan’s words resonate a little.

Bill’s first response was anger—this wasn’t his problem!—but it was quickly replaced by guilt. He owed Dan more than this boot out the door, and he knew it. He and Dan had spent a lot of time together when they were first building the company. They’d gone to bars, a few parties, had some fun, but they’d never had this kind of personal conversation. Who knew Dan’s life was so screwed up? As the years went by and Expantec grew powerful and prosperous, Bill worked harder and harder, got married, and started a family, and his relationship with Dan became all business. At least for Bill. Apparently, Dan had other ideas. Damn. Deep down, Bill knew he had been trying to avoid just this kind of personal confrontation.

The human resources head was also surprised. She had had no idea of the depth of Dan’s feelings for the company, or what it had meant to him. Of course, she really didn’t know Dan very well. She’d only been with Expantec for the last few years, and she had a lot of employees to keep track of. Layoffs were tough, in her experience, but everybody understood that this was life, and they moved on. But after seven hours of negotiation, the raw emotion of Dan’s story had broken down some of her habitual ways of thinking about her job. She felt drained.

Dan leaned back in his chair, exhausted but ready to proceed. The fact that everyone was still sitting there seemed to him a positive sign that maybe they'd heard him. He took heart and assumed a more businesslike attitude. Damn it, he was good at what he did. He really hated wearing his heart on his sleeve like that. "I understand the need to reduce costs," Dan told the company's general counsel. "But I know this company inside out. I'm confident that my experience and understanding of how this company works cannot be duplicated."

The general counsel was willing to pay Dan a modest settlement, but he also began to realize that the company was letting go of a valuable employee who could significantly contribute to the bottom line. "I'd like to talk to Bill for a few minutes, if you don't mind." The two men went out into the hall, and when they came back the attorney spoke directly to Dan.

"Look," he said, "corporate won't let us rehire you as an employee. That's just how it is. But as you well know, we've used the services of people like you as consultants from time to time. Would you be interested in that kind of arrangement with Expantec? You might even decide to start your own consulting business, and we would be your first client."

Dan was overwhelmed by the offer and excited about the possibilities. A new marriage, a new business . . . it could be a new start. "I've never had my own business," he said, "but it does sound appealing—especially if I know I can get business from Expantec."

Corporate counsel said that he would talk to Bill about guaranteeing a certain amount of consulting work for a period of two years. This would allow Dan to set up his own business while maintaining a steady stream of income in an industry to which he was already accustomed. And with a nationally known client like Expantec, he should do well with other clients.



When they finally hammered out a settlement, Dan got both monetary compensation and the promise of an ongoing relationship, including a consulting agreement. The Mediator was elated: this was the best possible outcome.

Dan later thanked the Mediator for his work in getting the settlement. “Maybe getting fired wasn’t the greatest thing that ever happened to me, but I have to admit that it was for the best. The negotiations forced me to take a good look at myself. I have some complicated personal issues to work through. I have to learn to keep my work and personal lives more separate. Anyway,” he laughed, “sleeping in the office doesn’t make much sense now that I’m going to be married!”

WHAT HAPPENED?

In some ways, this “sudden” turnaround seemed magical, even to the Mediator. But this negotiation didn’t take fifteen minutes. It took a total of ten hours, a lot of pacing, and a lot of effort on the part of the Mediator in trying to create an environment where everyone would feel comfortable. Just the Mediator’s talking to Dan wasn’t enough; Dan needed the audience with the other side.

Dan was a good-looking guy who dressed well, worked out every day, and got the job done. Because he carried all his feelings inside, no one knew how emotionally vulnerable he was. And because his coworkers really *weren’t* his family, they didn’t try to find out.

This mediation could have failed before it even began. If the Mediator had allowed the company to present its case to Dan, it’s likely that he would have been offended and deeply wounded, and not open to any more negotiation. Fortunately for both parties, the Mediator was fully engaged in the case.

He realized that the two lawyers were mistaking the conference room for a courtroom. A negotiation is a very different environment, with no judge or jury to preach to. Taking an aggressive position with someone so emotionally distraught would just alienate him further. As mediator, he saw the impediment. He wouldn’t let them present the PowerPoint to Dan, but he did let them present it to him. This way they could follow through with what they intended, and the Mediator could act as a filter for the information. Then, instead of accusing them, the Mediator used his litigating skills to ask them questions that got to the truth of their numbers. Challenging the employer’s claim in this way showed real grit and real skill.

He also went with his instinct that there was more going on beneath the surface, and teased that information out of Dan in a way that was nonthreatening and empathetic. He questioned Expantec about their figures and got them to see that maybe their case wasn't as strong as they thought it was. He persuaded the employer to listen to what Dan had to say without putting the employer on the defensive. Finally, he created an atmosphere in which everyone felt free to express himself or herself without fear of negative consequences.

It was key that Dan told his story when he did, two-thirds of the way into the mediation. It was the right solution, and it came at the right time. It's good to remember, as Pepperdine University Professor Randy Lowry always says, that *the right solution at the wrong time is the wrong solution*. Dan had to feel rejected, to understand that it was really over, and then to have the chance to tell his story. He was floored by the result.

The timing led to a compromise in which both sides felt that they achieved value in the transaction. Dan felt heard, maybe for the first time. Expantec realized that this wasn't just about group hugs: Dan still had something to offer the company. They gave him some respect, made him feel needed, and also offered a consultancy, which gave him the confidence to stay out on his own and start a new business.

WHAT STRATEGIES CAN WE LEARN?

1. Look for clues to deeper psychological issues.

Unresolved conflicts from a client's childhood development may play a powerful role in the current situation. Addressing the internal conflict will eliminate the obstacles to resolving the external conflict.

2. Create an atmosphere where both sides feel free to open their hearts, listen, and have compassion for each other.

Make an extra effort to be sure that all parties are fully informed and respectful about the other parties' feelings and desires (where they're coming from, so to speak). In this way you allow room for new information, as yet unrevealed, that would help resolve the conflict.

3. Consider your audience.

Adjust your approach according to the situation. You can act as a coach to help the parties understand what's going on. Sometimes lawyers are so intent on just presenting their case—hardboiled aggressive advocacy—that they forget they are in a conference room, not a court. In other circumstances, you can use headstrong maneuvers if you believe they will move the negotiations forward. Mediators who began as lawyers need to remember that they are not in a trial situation. In court, your audience is the judge and jury—the time for negotiation is over, and you need a powerful position. In mediation, this mindset can backfire. A skilled mediator knows which approach to use when.

4. Be transparent when you need to be.

Being transparent is sharing with the parties what you the mediator believe is the best task to focus on next and why you believe that task is the most appropriate. Letting people know where you're coming from helps them feel included in the process and offers you immediate feedback about strategic decisions. It saves time in the long run by reducing delays created by uncertainty about the process, and gives the parties a window into your thinking.

CHAPTER TWO

PAINTBALL PRANKS

It was the opening session of mediation, the lawyers were gearing up to present their cases, and tensions were high. It didn't help that the primary figures in the case were all younger than eighteen. On one side of table sat the plaintiffs: Steven, his jaw clenched tight, was sitting next to his eight-year-old daughter, Danielle, who was concentrating on drawing and seemed to be trying to make herself as small as possible. The defense side of the room was more crowded: four seventeen-year-old boys—Harvey, Justin, Devin, and Noah—who were alternately slouching and twisting in their chairs, and two anxious, defensive parents for each boy. *It's going to be a long day*, thought the Mediator.

As the Mediator listened attentively, each lawyer told his version of the small drama that had unfolded on a warm afternoon a few months earlier in Lader, a small suburban town. It was quite a vivid picture.

Lader was a relatively affluent suburb, with nice parents and nice kids and not much crime. But teens didn't have much to keep them occupied, so the town had its fair share of cars and houses being egged during Homecoming and trees that were festooned with toilet paper. On this particular afternoon, the four boys, all friends since grade school, were hanging out after school with nothing to do. As luck would have it, Harvey's parents had recently bought him four paintguns and some paintballs. The boys were planning to go to the local paintball field for a full-out tournament, but that wasn't until the weekend. They were bemoaning their sad fate and staring longingly at the guns—which looked just like handguns and fired paintballs at up to two hundred miles per