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WHY REINVENT THE WHEEL? TAPPING CONSULTATIVE SELLING RESEARCH TO EXPAND MEDIATOR EFFECTIVENESS

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So much of what we do as mediators is based on the Getting to Yes process developed for negotiators. Basing our conduct on negotiation makes sense, if you think of mediation as facilitated negotiation, but mediation is that and more. It touches on areas as diverse as risk management and return on investment and emotional aspirations and the angry desire for paybacks. The list is as complicated as the people caught up in a dispute.

This paper suggests we can make more progress in understanding how disputes settle if we look to other fields, such as sales, that have faced similar challenges in determining what makes a person effective in their field. In particular, the paper explores the discoveries of researchers at Huthwaite Incorporated in America and Huthwaite International in England on negotiation, communication, and sales—and shows how that research can be applied effectively in the mediation setting.

The research findings of Huthwaite Incorporated in America and Huthwaite International in England about negotiation, communication, persuasion, and sales are extensive and wide-ranging, but here, in a nutshell, are some of the essential elements that are relevant for mediation. Huthwaite's studies found that people have to go through stages before they are willing to make a major decision of consequence.[1] Each stage, from recognizing needs, to evaluating options, to resolving concerns, to making and implementing a decision, involves different issues, different questions, and different answers. All are challenging and require deep thinking. And people can get stuck. Further, Huthwaite found it is not

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[1] *See generally* Neil rackham, Spin Selling (McGraw-Hill 1988).

advocacy—that is, telling—that most helps people move through these stages, but asking well-thought-out questions. That's because in answering those questions, people get a chance to discover for themselves that movement is better than standing still.

These findings came as a result of applying Behavior Analysis, a methodology created by Huthwaite's founder, Neil Rackham (who is now my husband), first to teaching, then to therapy, and finally to negotiation and sales. Boyce Appel, a gifted management consultant to architecture firms, introduced me to that research in 1996 in a course on interactive communication behaviors and persuasion. The impact of that course was profound. It slowly changed how I handled myself in business meetings[2] and at the negotiation table. As the changes were both measurable and positive, I began to apply the communication behaviors and their strategic use in teaching negotiation at George Washington Law School.

First, let me explain Behavior Analysis. Behavior Analysis identifies communication behaviors that correlate with, if not cause, success. Each behavior is closely defined, so there is no overlap. Each behavior is also objectively defined, which eliminates the need to guess the intent of the speaker. In short, the language speaks for itself and is coded accordingly.[3]

An example: For any group[4] to reach a decision, someone has to *Initiate*—that is, put a proposal on the table; everyone has to share enough information to *Clarify* the proposal so that everyone is talking about the same thing, and the group has to *React*. These three key behavior categories can be broken down into smaller behaviors, as long as each behavior can be separately and clearly delineated from all other behaviors. Moreover, each behavior has to be unquestionably objective, so a high-enough degree of inter-rater

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[2] By 1996, I had served for nearly 10 years as vice president for program services in the leading architects' and engineers' professional liability insurance program of the time, an experience that taught me that clients value success in business much more than word-smithed insulation from liability.

[3] *See* Neil Rackham & John Carlisle, *The Behaviour of Successful Negotiators*, 2 J. EUR. & INDUS. TRAINING 6, 6–11 (1978). *See also* Chapters 5, 6, and 7 in my book, AVA ABRAMOWITZ, THE ARCHITECT'S ESSENTIALS OF NEGOTIATION (2nd ed., New York: John Wiley and Sons 2009).

[4] A mediation, by definition, involves a group—mediator(s), two or more disputants, usually two or more lawyers, and often an expert or more. If an implementable settlement is to be reached, each participant has a role to play in its development. *Getting to Yes* spells out the most-used process. Behavior Analysis details the communication behaviors each participant uses and correlates their chosen behaviors with impasse or movement or whatever else the researcher wants to explore.

reliability can be achieved. This allows hypotheses to be tested by anyone certified to observe, results to be replicable, and evidence-based education and training to result.

While Huthwaite research on communication behaviors changed my thinking about negotiation, it took a while for me to appreciate how deeply a particular subset of that research was informing my thinking about mediation. That subset's focus is on persuasion. Its conclusion: unless you are in front of a jury or have a microphone in hand and your audience is expecting you to persuade (and wants to hear you), "telling" doesn't persuade all that well. The truth is, people are highly resistant to changing their position, and because they, not the persuader, will have to live with the consequences, they will shift their position only if they decide it is in their interests to do so. What produces results, what convinces people to move, are the insights that well-thought-out questions prompt.[5]

Yet law students are taught from day one that great advocacy, the lawyer's version of telling, is the mark of persuasion and the calling card of a great lawyer. Not listening to learn. Not understanding sufficiently to empathize, not struggling along with the other person to work out an issue, but telling. This idea is reinforced in class after class. By the time they graduate, too many students think, "I know. You don't. That's why you hired me. *My* expertise. *My* skills. We will apply them to your problem. It'll work out. Trust me." Maybe that's why so many cases take on a life of their own. Clients buy into the lawyer's ether and get lost in the fog. I came to this conclusion slowly, painfully, and unwillingly. I had been an assistant United States attorney for five years. I knew the power of good advocacy. I had witnessed it in others.

As a mediator, though, I had also watched lawyers "advocate" for years to no end. Many of the advocates appeared to focus more on their speech than on the impact of that speech on the Other.[6] I concluded then—and still believe—that a "talking to im-

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[5] *See* SPIN SELLING, *supra* note 1. *See also* NEIL RACKHAM, THE SPIN SELLING FIELDBOOK: PRACTICAL TOOLS, METHODS, EXERCISES AND RESOURCES (McGraw-Hill 1996) [hereinafter SPIN SELLING FIELDBOOK].

[6] I use "Other" to convey that the person sitting across the way is neither a friend nor an enemy, simply another person with their own view of the problem, its causation, and its best resolution. In my book, ABRAMOWITZ, *supra* note 3, I developed the term "Other" to counteract nascent negotiators' tendency to put their egos front and center on the negotiation table, especially by personalizing their relationship with the other party. "Other," I found, helps the negotiator recognize that the person sitting across the table is not a friend or an enemy, just an Other person with their own view of the problem, how it occurred, and how to resolve it. Con-

press" approach to mediation advocacy is as effective as encasing your feet in cement.

When I was first introduced to Huthwaite's research on the power of the well-thought-out question twenty-six years ago, I was ready for it. As a court mediator, I viewed mediation then—and still see it—as a gift from the court that empowers disputants to regain control over their predicament, resolve it, and get on with their lives in any way they want, as long as their resolution is both legal and consistent with social policy.

Huthwaite's research empowered me to breathe increased effectiveness into this "worldview."

My takeaway from the research? Mediators are most useful when they help the parties to action by *working with them* to understand what problems are holding them back and *devising with them* several *bona fide* problem-solving routes, as well as options, from which they can collectively choose the best to move ahead. If Huthwaite's research on persuasion doesn't propel the *Getting to Yes* process of "building common ground," what does?

Basically, Huthwaite teaches that there are four key types of questions in sales, which add up to the acronym SPIN: Situation questions, which like Sergeant Friday's questions of yore, focus only on facts as the Buyer sees them; Problem questions, which focus on the Buyer's problems, difficulties, and dissatisfactions; Implication questions, which extend those problems into both the

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trast "Other" with the terms we lawyers routinely use to characterize the parties sitting opposite us at the negotiating table—the counterparty, the opposing party, the opponent, the other side, the adversary. Each of those terms anchors too much baggage in the mind of the negotiator—competition, win-lose, war, and more. All unnecessary, all counterproductive. "Negotiating partner" is just as bad an anchor, but on the flipside (friend, collaborator, and more). All these terms create unconscious assumptions with unnecessary negatives or unrealistic positives that stymie the negotiator and impede the negotiation process. "Other" is a truly neutral term. All it conveys is that the person with whom you are negotiating is not you, a concept that frees up negotiators to listen, to learn, to know that everyone at the table has something important to say, including "You." I am aware that in this day of ethnic and religious hostility, some people use "Other" to dehumanize their enemies. But negotiation theory has many terms with double and inconsistent meanings. "Negotiate" means "to conference with another for the purpose of arranging some matter by mutual agreement" and "to cross, get over, round, or through (an obstacle, etc.) by skill or dexterity" as well as "to get the better of." *Negotiate*, THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY (1980). Confrontation is no more monosemous. "Confront" means "to stand against hostility and violence" as well as "to join with a mutual frontier." *Confront,* THE OXFORD ENGLISH DICTIONARY (2022). Such antagonyms should come as no surprise to negotiators. People are complex and often conflicted, strongly holding two sets of opposing interests or positions, if not more, possibly unaware of the internal dispute fighting for their attention. One person's duality is another's duplicity. It's what makes negotiation a challenge and a ripe field for the consultative-selling skills that Huthwaite developed.

short and long-term future, allowing the Buyer to explore the problem's contours and consequences; and Need-payoff questions, which focus on solutions and the benefits they could bring the Buyer.[7] In analyzing Seller questions and correlating them with sales made, Huthwaite found that when Implication and Need-payoff questions are successfully and frequently used, the sales call will most likely link to success.[8]

Please note—I know mediation is not like sales. In complex sales, a success is an agreement to buy. In complex mediations, a successful intermediate step is for the parties to move *at all*. But most of the ideas spelled out in Rackham's many books can be morphed into mediation tools.[9] This paper describes how I have used some of my favorites when mediating. Feel free to use them your way. All envision ethical strategies to help complex entities with complex needs come to agreement.

I. The Freeing Power of Questions That Help Parties Learn from Themselves

Let me give an example of an application of Huthwaite's research on the power of the well-thought-out question. The plaintiff, in her late twenties, had been run over by a bus. That she had been hit—and injured—was clear to both the woman and the company that owned the vehicle. Her lawyer's demand was astronomical, the company's counteroffer, meager. I was told to prepare for a long distributive mediation. "Get your haggling shoes on," someone in the court's ADR office told me. Haggling shoes? I didn't own any.

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[7] You should know that much of Huthwaite's research findings are counterintuitive. Their value, though, has been proven in the market. The first 1,000 salespeople trained in SPIN Selling methodology, for example, enjoyed a 17% increase in sales compared to those in control groups in the same companies. SPIN Selling Fieldbook, *supra* note 5. As of the day this article was written, *SPIN Selling*, first published 33 years ago, was still number three in Amazon's business-to-business sales books.

[8] The reason for that success should make immediate sense to all negotiation mavens. Implication questions focus on loss. Need-payoff questions focus on gain. Instead of worrying which path will most likely produce common ground, SPIN Selling, *supra* note 1, affords a negotiator a "tree-lined" avenue around the dilemmas posed by Gain/Loss theory. In the mediations we have coded to date, most lawyers ask primarily Situation Questions, a few Problem Questions, and *no* Implication or Need-payoff Questions. It would be interesting to research why.

[9] Huthwaite's findings can also be used in deal-making, a close cousin to mediation. *See* Abramowitz, *supra* note 3, at Chapter 7, on collaboration and team building.

In the mediation room, I didn't ask the plaintiff about the case, its legalities, or anything connected to her suit. My first question to her was, "Are you okay?" My second: "What was it like being run over by a bus?"

She talked and talked. I listened. I then asked, "How has it impacted your life?" She talked and talked.

I listened, and when she ran out of steam, I asked her a series of questions: "You said that you hate your job. Why are you still in it? What will happen if you stay? What would you like to do instead? Given all you have said, what's stopping you from leaving?"

She said she needed money. She had been accepted into a yearlong training program for a new and better job, she said, but she couldn't afford it.

I sought more information, asking exactly what she meant by "can't afford." An hour later we had a budget for training and living expenses for one year, with an extra $25,000 in case we had missed something.

When I met with the defendant, I asked one question. "How would you like to help this young woman start a new life?" I explained her predicament, the budget, and the thinking behind it. The defendant said yes—and then volunteered some extra money to cover legal fees so that the woman could have all she budgeted for. The case ended that day.

This research on persuasion sang to me even more when I read Huthwaite's research on what people go through to move to "yes." As spelled out in the book, *Major Account Sales Strategy*,[10] buyers go through various stages before they are willing to make a major decision. No stage can be skipped. Light bulbs went off. So, this is what disputants go through! They get stuck in a stage. They get afraid to move.

Here are the stages in the decision process of matters of consequence:

My mind spilled over into mediation. If disputants have to go through each stage at their own pace (however they define it), pushing disputants for a decision, telling them what they should do,

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10 *See* NEIL RACKHAM, MAJOR ACCOUNT SALES STRATEGY (McGraw-Hill 1996).

could only make things worse for them. Better to ask neutral questions that will help them decide, on their own, where and when they want to move. Is that what the research is suggesting? Do questions routinely provide a better path to settlement? In all cases or just in some cases? If they help in some cases, which ones?[11]

We need new research to answer those questions, but while we await answers, we can easily apply the Huthwaite research to mediation. Simply put, their research states that, before people can make a weighty decision, they have to conclude there is no "win" in standing pat. Unless they *recognize the need for change*, including the pains of doing nothing and the opportunities lost if they had done something, you can argue with them until you are blue in the face, but they ain't moving. They like where they are. Until they don't.

The research tells us even more. Effective questions help people talk through and weigh the costs and consequences of the *status quo*. It is their own answers that help people see for themselves that the *status quo* costs them too much. But even acknowledging that, disputants might be too frightened to move unless they also start seeing options that sing to them. It is the existence of options and the *evaluation of options* that give them the reason to move and the *resolution of their concerns* that gives them the confidence to move. Only with a detailed and responsive resolution-of-concerns stage, identifying and resolving each risk in implementation, will they feel safe enough to make a decision and commit to it. The decision is now a well-designed solution, not a claim waiting to happen. Success has been reached because successful implementation is a very real possibility. The solution, simply put, is no longer a risk.

I know we lawyers are trained to manage risk through wordsmithing and other mechanisms that insulate our clients from liability. But those who figure out how to manage risk and then manage it successfully are the ones who flourish in our society. When they succeed, we call them entrepreneurs. Planning with our clients to build infrastructures that will lead to their success is a far better

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[11] While sales and mediation both involve "persuasion," we have no research on whether and when Huthwaite's approach to persuasion works effectively in mediation. Having used the method for more than two decades, I have found it works and works best when the disputants want to solve the problem. Its utility varies when disputants *and their counsel* want only to settle the case, particularly if only for a sum of money. The need for research is clearly indicated.

way to manage risk than insulating them from liability, as that too often plants seeds for future conflicts.[12]

II. The Freeing Power of Managing Human Risk Well

Risk. Risk to me then and now is the biggest elephant in the room. Not mainly legal risk. Not even litigation risk, though lawyers are keenly aware of both. What I have in mind is *human risk*. Mediators ask disputants (and their lawyers) to consider jumping off a bridge into the waters of the future with no guarantee they are going to land safely and be happier than they were before they jumped. Now that, to me, is *real risk.* Huthwaite's research on decision-making gives mediators an ethical, nonthreatening way to help disputants deal with human risk straight up and effectively.[13]

And that very real, very scary human risk is why trust in the mediator is so important to counsel and disputants. Trust is what allows disputants to suspend judgment and work through "possibilities"—believing that the mediator will do them no harm and allow no harm to befall them. That is why creating a trusting environment for the safe sharing of internal information is so important. That is why discovering which communication behaviors build trust and which hurt trust-building is a matter of such consequence to the profession. It is because managing risk is of such consequence to the disputants.

The mediation literature lawyers read, by and large, does not address human risk all that much. It is more focused on litigation risk or alternatively discussing ways the mediator can build participants' trust in the mediator. That second tack, however, tends to put the mediator, not the disputants and their needs, in the fulcrum of the process. In my worldview, the disputants, not us, should be front and center, ready to engage with all issues for discussion and ultimately resolution. Perhaps having teaching and training centering on mediators instead is, in part, why we mediators need to work so very hard to build trust. Maybe all would fare better if we mediators refocused our trust-building energies away from our-

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12 *See* Abramowitz, *supra* note 3, at Chapter 3 on "The Purpose of Contracts," which spells out a methodology for managing risk successfully, and Chapter 9 on "When the Best Laid Plans," applying that methodology to dispute resolution.

13 The process works with legal and litigation risk, too.

selves and more toward helping lawyers and their clients recognize, address, and manage the human risk facing them.[14]

As a result of this research, I changed my own behavior. To the parties, I worked hard to make myself a consistent and transparent "given" so they would feel safe enough with me to answer my questions. Before any inter-party, face-to-face mediation could occur, I would go to counsels' offices and sit down in their space. They would be in control of the agenda, knowing that I would spend as much time with them as they wanted, helping me understand where they and their client were coming from and where they wanted to go. We also would work through their client's strategic issues so that when we met later in caucus and in joint sessions, they would comfortably be able to step back and let their client speak. With that, over time, I discovered that this process not only helped me identify common ground but helped me *reduce the risks* of mediation to the lawyers, the disputants, and even the mediator.

The research changed my mediation behavior in other ways. First and foremost, viewing mediation from the disputant's "risk perspective" ended up rearranging my use of both the joint session and caucus. I know that for many practitioners, the caucus is the default choice on how to manage a mediation. For me, my default was the joint session. Now I no longer have a default. Which to use, and when and how, is now a strategic decision.

An example (or two). In any mediation, one party—let's call him John—might be in one place in the decision process described above, while the other party—let's call her Mary—is in another. Caucus can be the safe place to help John move through the decision process without embarrassing, confusing, annoying, disheartening, or boring Mary and thus making a hard case even harder to resolve. Caucus can also be the safe place for anyone to try out new ideas. It can be the safe place to help, resolve attorney-client differences. It can be the safe place for coaching, for helping a disputant figure out how to speak so he or she can be heard. Caucus can even be the safe place for the mediator to test the validity of their understanding, and the wisdom of their thinking, without risking embarrassment or making a tough case worse. Put it all together, caucus is a terrific place to manage risk—and thus a great place to build trust.

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[14] We await the research with more focus on the dynamics of mediation, risk management, and trust-building before we posit anything on that question. In the interim, we still have to mediate.

I know some mediators use caucus not for those purposes but to bludgeon disputants into acquiescence. One construction lawyer, who had requested my services because he said I would be the "perfect mediator" for the case, suggested I take the plaintiff to the woodshed "and beat some sense into him." I explained that beating people up was not my forte. I did not get hired, perfect mediator that I was.

III. The Power of the Co-Designed Mediation Process

The joint session, like caucus, can be transformed into a strategic tool if there is a chance that disputants might opt for using the mediation to resolve the problem that created the dispute, and most certainly if they are contemplating a long-term working relationship.

This case was old. More than two decades old. It had been up and down the courts—even to the Supreme Court. The lawyers had changed over time, as had the mediators. The parties were numerous, and most of the lawyers represented unnamed parties. By the time I was assigned the case, three lawyers representing nearly 10 parties had agreed to mediation. Each told me the case was not going to settle. "Terrific," said I. "We have common ground."

After spending considerable time with the lawyers separately, I invited them to meet with me *together* to figure out how to make the case mediate-able. Now, I know mediators are responsible for designing the mediation process, but that figment of our imagination ends the second one of the lawyers says, "I don't want to do that." It is far easier to involve them directly in the design of the process. For most lawyers, exploring how to make a case mediatable is a low-risk proposition. It enhances their sense of control. It also helps them with their clients. They can tell the clients exactly what's going to happen, which, in turn, reduces the client's sense of the risk involved in mediation and in the settlement process.

It benefits the mediator, too. Lawyers who are involved in designing mediation will know more about the case, the people, and the problem, as well as how all three intersect. If discovery is over, there are probably no secrets. (Well, maybe one or two.) Including the attorneys also puts the lawyers on the same side of the table as the mediator, confronting one challenge together: how to make

the case mediatable. Everyone gets used to working together constructively.

Bear with me for a short discussion here about sales. Complex sales, high-stake sales, like complex and high-stake mediations, usually require several meetings. Unlike sales, however, where the final meeting results in an agreement or a rejection, mediation sessions don't always end with such a clear outcome. What mediators regard as success is movement. As long as the parties are still talking, we figure there is still hope for a settlement.

But we can do much more than hope. Sales research on meeting outcomes provides tried and true ideas that mediators can translate into action.

Sales research suggests that there are two possible outcomes for intermediate meetings–a successful one and an unsuccessful one. The unsuccessful outcome is labeled a c*ontinuation,* with another session scheduled but no commitment by anyone to do anything that would help move the sale forward. These sales meetings rarely ended up in a contract to buy.[15] "This was a great meeting. Let's talk more next week," may encourage the salesperson, but the data show that a good percent of the time the encouragement leads nowhere. Successful intermediate meetings produce an *advance,* where all parties agree to take steps during the break between sessions that measurably move the sales forward. "Let me meet with my CEO and CFO and see what they think" can be the ticket to commitment.

Mediation is far more complicated than sales. Figuring out what advance—what in-between-meeting "homework" will help the parties move—often does not come easily. If the mediator asks too much of the parties, nothing will get done. If the mediator asks too little, the parties might feel that the mediator is wasting their time.

Sellers plan as many as five advances before they meet with the buyer again—in my mind, they think of a gangbuster move, a small action that might push things forward a bit, and two or three advances in between those extremes.[16] Now, sellers don't tell their buyers what advances they have in mind, but in translating this sales concept into a mediation one, I decided that achieving trust and transparency requires me to tell all. Back to the mediation.

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15 SPIN SELLING, *supra* note 1, at 42–47.

16 Neil Rackham & John Carlisle, The Effective Negotiator—Part 2: Planning for Negotiations, 2 J. EUR. IND. TRAIN. 2 (1978).

At our first joint all lawyer-mediator meeting, I explained the concept of the advance. The lawyers were the epitome of professionalism. They saw immediately how it would reduce risk for all involved. To that end, over the nearly two plus years the case took to settle, the lawyers and I met two to four weeks before each scheduled mediation to decide:

- What was the best advance we could hope for?
- What was the smallest advance we might achieve?
- What advances were there in between? If we were aiming for the best,
  - who had to attend the mediation for the advance to take hold?
  - how, from each lawyer's perspective, should each attendee be prepared?
- If any homework had to be done by any of us for the best advance to occur,
  - what homework was necessary?
  - who should do it and by when?
- Would we need another meeting before the mediation to set the best advance in motion, or would phone calls suffice to keep us and the mediation on track?

I suspected there would be benefits from this — primarily decreased risk and increased trust. What I hadn't realized were that there were more benefits coming. First, when the parties met in joint session, the parties sat at the table and the lawyers sat behind them, there if the parties wanted to call on them but otherwise saying nothing. The lawyers had no reason to talk. They were that comfortable with the process and their client preparation. Second, I got to work directly with the parties. I used mostly these communication behaviors, and in no particular order: Seeking Information, Testing Understanding, Acknowledging, Introducing Possibilities, Building on the Proposals of Another, and Summarizing. The parties did the heavy lifting. Through their answers, they found common ground and they designed the solution. Oh, yes, lawyer-client caucus meetings were called from time to time, but not that many. Basically, all arrived at the mediation prepared to move the case forward. With that determination, the case ultimately settled.

Could such success happen with less accomplished lawyers? I don't know. That's what research is for. I suspect, though, that, if my experience working with these lawyers to develop advances is any indication, the answer might be yes, assuming my experience is

typical of other mediators. That may not be true. The US Court of Appeals for the District of Columbia and the US District Court for the District of Columbia are deliciously supportive of the mediation program. As long as the disputants report to the court that they have hope of a settlement, mediators and mediation have the courts' support. It is not that I am *sui generis*. It is that the courts are *sui generous*.

IV. The Power of Self-Reflection in Avoiding Impasse

While we await empirically tested answers on the impact of lawyer sophistication, go back with me more than twenty years to see the impact of mediator unsophisticatedness. Before we go there, though, let me share some Huthwaite research on negotiation.

Huthwaite applied Behavior Analysis, which, as I explained earlier in this paper uses trained observers to note which behaviors everyone involved uses, and how often, in real-time negotiations. From those observations Huthwaite developed 11 categories of communication behaviors used in negotiation. They then grouped the most positively impactful of these categories into two negotiation styles that they saw most often used effectively by the negotiators they were observing.

They used the term *Pushing* for communication behaviors such as Proposing, Giving Information, and Disagreeing, where the energy comes from the persuader; and *Pulling* for communication behaviors such as Building, Seeking Information, Testing Understanding, and Summarizing, where the energy comes from the persuadee. Using this approach to communication behavior analysis, Huthwaite discovered that both the *Pushing* and *Pulling* styles of persuasion work in negotiation, but not equally well in all circumstances.[17] Whether they also work well in mediation, and under what circumstances, is a good subject for further study. My experience with both suggests they very well might.

Back to the unsophisticated mediator of more than 20 years ago. I was just beginning to learn the communication behaviors Huthwaite had identified and how to use them effectively working on a mediation that involved an allegation of libel. I was also in the process of bungling that mediation, though, when the discon-

[17] Abramowitz, *supra* note 3, at 175–82.

nect between the parties' needs and the mediator's needs came home to roost. As many a mediator would say, *I* suffered impasse. Because of finally understanding the impact of speech, I felt strongly that I might have been the one who had caused the deadlock, but I had no idea how.

On the hour-long drive home, I figured it out: I had started the mediation process as a Puller, using Seeking Information, Testing Understanding, Summarizing, and Building, and then sometime, late in the day, I had switched behaviors and become a Pusher, using Proposing, Giving Information, and Disagreeing. That inconsistency alone could have undermined my trustworthiness. I could just imagine the parties thinking, "Who's this? Where did that nice explorative, empathetic mediator go?"

I dug deeper until I figured out exactly what had caused me to change. As the clock approached 4:00 PM with no settlement in sight, I had panicked. The case needed to settle. That was true, but truer still, *I* needed the case to settle. So, I switched styles and became a Pusher.

Mediation is risky enough for the disputants without some mediator pushing them to decide "now." Saying no is easier than saying yes, since no is almost always reversible, but yes, not so much.

If only I had known enough then to say, "Boy, did you work hard today" (Encouraging). And "let's choose another day to meet again" (Proposing Process). And "is there anything you need to look into or to have the other party look into to make this dispute more mediatable?" (Seeking Information: Facts). Or "Anything I need to do to help you all out?" (Seeking Information: Process).[18] With mediation "homework" assignments to help the disputants advance their understanding of each other's and their own interests, we could have then scheduled a second mediation day for them to apply their new understandings to resolving the dispute.[19]

Why am I telling this story? Because that day, when I realized that mediators can contribute to—and maybe even cause—deadlock, I hit the academic journals to discover what the research says about preventing impasse. I found no articles. Zero. I found lots

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[18] These are some of the 23 mutually exclusive mediation behaviors that my co-researcher and I have identified so far.

[19] By the way, this blown mediation ended my practice of keeping track of my win-loss rates. I figured thinking of mediation as a belt to be notched put one more ego at the mediation table. Mediation was hard enough without that. Our success as mediators shouldn't be measured by our settlement rate but by the disputants' long-term settlement success. It also makes me wonder whether courts that have a four-hour deadline (for example) would benefit from research on the impact of that deadline.

of articles on handling deadlock with lists aplenty on what a mediator can do when deadlock occurs. I found lots of articles on handling difficult people, but no discussion about what to do when *you* are the difficult person in the room. Wouldn't it be great if program administrators and their mediators had the type of information Behavior Analysis can provide on mediation dynamics, especially if research proves that mediator-induced deadlock exists and is preventable? Mediators could be trained in how not to invite impasse.

My many years of sitting in on conference sessions on the topic of impasse have led me to conclude that I am not the only mediator to have caused an impasse. In fact, in one such session, the moderator asked each person to discuss their most recent impasse. He then asked the group to figure out what they could have done to keep the mediation going. With that assignment in hand, the group focused on how the mediator could have handled the deadlock. Most of their attention was drawn to how mediators should handle bad lawyers and bad clients.

As I listened, I wondered whether the impasse could have been prevented with a tad more training. I concluded that most of the deadlocks described in that session were preventable, as most of the situations involved a party's "reactive devaluation" of a mediator's proposed solution, and the mediator not letting go of their idea. Now, I know there is such a thing as reactive devaluation. Lee Ross's and Constance Stillinger's 1991 study "Barriers to Conflict Resolution"[20] brought home to me that people often reject an idea because they believe that the person who proposed it is either not considering their interests or is otherwise unworthy of trust. But I also recognize ineffective persuasion—bad selling, so to speak—and that was what the mediators were describing that day. Fortunately, bad selling can be trained away.

Bad selling is all too often the function of the seller jumping to solutions. A buyer states a problem? The seller jumps. "I can fix that!" They do it for many reasons—all human, all understandable, all ineffective. Here are some of the reasons sellers jump to solutions:

- They think they are adding more value if they offer solutions.
- They are impatient to move forward as fast as possible.
- They think that clients expect them to talk about solutions/approaches.

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[20] Lee Ross & Constance Stillinger, *Barriers to Conflict Resolution*, 7 NEGOT. J. 389 (1990).

- Talking about solutions feels safe.
- Getting excited about solutions is easy, particularly when the solutions show off the seller's expertise.
- They believe that proposing solutions is their job, what they get paid for.

But it's dangerous. Sellers can misunderstand the buyer's problem, its nature, its contours, or its implications. If they get any aspect of the buyer's problem wrong, they invite objections, rejections, and worse—contempt. Demonstrating cluelessness never secures a sale.

Now lawyers are not salespeople, but law school rewards the quick, as do judges. No professor, no judge has the time or inclination to await an answer. Those who answer fast (and, I grant you, correctly) get an "A." Those who can't answer fast don't raise their hands, even though they know the right answer. Rewards go to the former.

Take this law school training into mediation and faux reactive devaluation results. Learning to hold back is hard, but it can be taught. It can be learned. You merely have to substitute a different communication behavior for the impulse to propose solutions too soon. We could train mediators to use other behaviors, such as Seeking Information, until the disputant tells them they fully understand the contours and implications of the risk the disputant is facing.

We could train mediators that then—and only then—should they Propose Solutions or Introduce Possibilities.

Now consider this concept in a real mediation. I was mediating a case involving two big companies, one located in Asia, the other in Florida. Both CEOs were heavy hitters. I was meeting with the Florida CEO and his counsel. We talked for a very long time. All was good. The counsel left to call a taxi to the airport. The CEO started to pack up, throwing his stuff into his case. I heard him mutter, "If only I could get this (expletive deleted) case to disappear."

"Excuse me," I said, "but I overheard that. Are you saying that if you could get this case to disappear, you would be happy?" "Lord, yes," he said.

I continued. No damages for his side? No legal fees for his lawyer? He and the other CEO just go their separate ways. Let bygones be bygones?"

He said yes. How, I asked, would that be in his interests? Once I was certain he was certain, I urged him to talk to his lawyer. Both agreed: make it disappear.

I met with the other party's counsel. Knowing that for many people from cultures in East and Southeast Asia, saving face is important, I asked the lawyer about her client. "He's a gardener at heart," she said. "This case is driving him crazy."

I was eager to jump to solutions but restrained myself. I took the time to explore the CEO's needs, hoping to see where there was a solution from his perspective. There was, and it begged for case dismissal. Five days later, both parties had the relief they wanted—with prejudice, of course.

Now, although I am a Pull mediator most of the time, don't think for a nanosecond that I disdain Push mediators.[21] I am in awe of the best of them, a feeling that comes home every time I co-mediate with a truly effective Push mediator. By and large, from the ones I have been lucky enough to observe, their most-used communication behaviors are 1) Giving Information: Facts, and 2) Seeking Information: Facts with 3) Acknowledging thrown in. When they Initiate, they are just as likely to Introduce Possibilities as to outright Propose: Substance or Content. To the best of my memory, most of the best of them had position powers or a known specialty expertise and were retained precisely for that reason.

Which raises this issue: how many mediator models are there? There must be more than the two approaches I explored here. Mediation is much too complex to think otherwise. As only empirically observing a statistically significant number of live mediations will get us that answer, we will have to expand our research endeavors. Until we do, let's rely on the successfully tested research of others and see where it takes us.

So, there you have it.

This is what sales has to teach us. Do what you can to help disputants and their counsel deal with the human risk inherent in mediation. Ask well-thought-out questions, ones that help the parties decide that, yes, they want to make a shift, and in which direction. Invite counsel to join you in designing the process, in planning advances. Don't jump to solutions. Seek Information instead. Help the parties noodle the problem through for themselves

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[21] I believe the needs of the disputants, and maybe even the nature of the dispute, should dictate mediator style. In other words, to serve effectively, mediators need to be stylistically "multilingual."

so they develop solutions they can live with. Because they will have to.

And this is what common sense has to teach us. Do try any and all of these ideas on for size—but with this caveat. Mediation is stressful enough for the mediator without adding experimentation to the equation. Try out only one skill at a time, practicing it as many as three times in real situations before deciding whether it works for you. If it doesn't, let it go. You can always revisit it another time. In other words, stretch but do not snap. See whether you can make the ideas work for you and the disputants who call upon you for help. And when you do, if they work for the betterment of all, tell your colleagues. We can all become more effective more quickly when we build on each other's learning.[22]

22 This paper could not have been written without the support of Huthwaite. My thanks go to Neil Rackham, its founder, Tony Hughes, its long-time British CEO, and Kenneth E Webb, my Behavior Analysis co-researcher. Special thanks go to Marjorie Aaron and Louisa Williams whose ways with ideas and with words helped me enhance my own.