Before It Hits the Fan

Using Neutrals When Negotiating Agreements

BY PEGGY FOLEY JONES & OBIE OKUH

What if we told you that at the post office there is a lockbox containing a conditional gift of $20 million dollars? To successfully retrieve the gift, you must enter the correct combination for the lock. If you conduct the unlocking process on your own, you will have three opportunities to guess correctly within 24 hours. If, on the other hand, you prefer to consult an experienced locksmith, you will have seven opportunities and up to 48 hours to guess correctly. The locksmith charges a 0.1% recovery fee. *What would you do?*

Negotiations, whether involving the initiation of relationships, modifying the terms of existing relationships, or settling disputes, are about unlocking opportunities. Mediators are professionals trained in the science and art of assisting parties in understanding each other's point of view and interests and exploring creative solutions to a problem. Yet, lawyers usually look for mediators only in the context of dispute resolution after a lawsuit has been threatened or a complaint has been filed. This is partly because very few law school curricula discuss the role of neutrals. Those that do present these practitioners as consultants whose role is to put out fires and rarely as professionals whose expertise early on during the initiation of the relationship may help eliminate the likelihood of disputes down the road.

This article advocates a new way of thinking about mediation and neutrals. First, we present the results of a small empirical survey on negotiation trends, which we conducted in early June 2012. Then we discuss the benefits that a mediator can bring to the table during the negotiation. We intersperse our discussion with case studies that highlight best practices. Finally, we raise some of the implications of non-dispute mediation roles for practitioners — in particular, immunity, privileges and confidentiality issues.

Trends in Contract Negotiation Survey

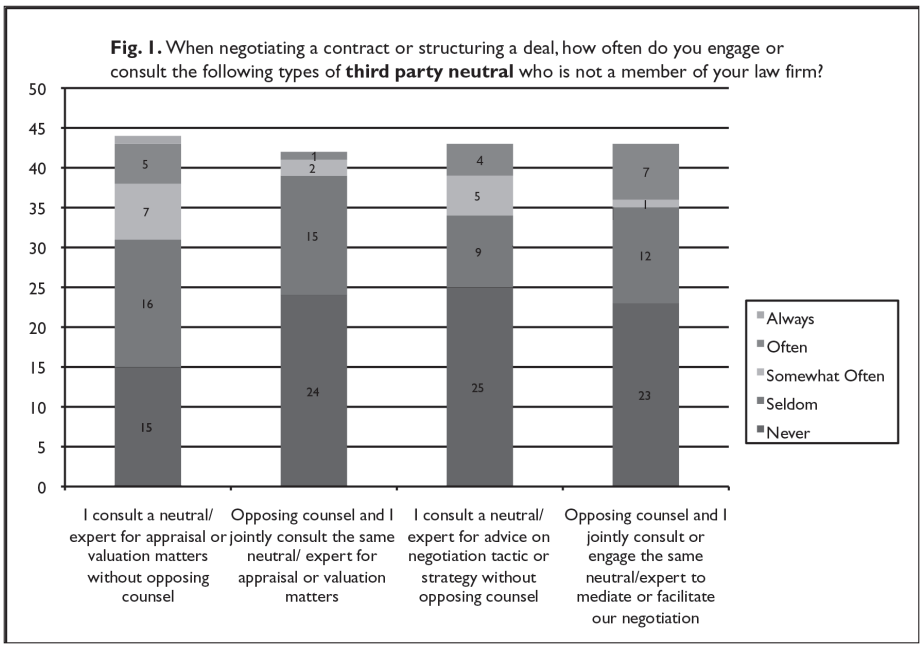
We set out to find out whether attorneys who negotiate agreements that create new business relationships could benefit from using neutrals in facilitating the process. After reviewing emerging literature on the subject, we hypothesized that 1) attorneys rarely consult third-party neutrals who are not associated with the attorney's firm to mediate their contract negotiations except in the context of dispute resolutions; 2) the percentage of negotiations that do not successfully result in contracts would be moderately significant; and 3) we will find evidence of a need to engage neutrals based on attorneys' perceptions about why negotiations fail. We developed ten questions to test these hypotheses. Six of these questions were purely demographical. Two questions asked for the respondents' business routines, and the final two questions asked respondents to describe their perceptions, based on their overall awareness of the local legal market, of why negotiations succeed or fail and to describe the reasons for negotiation failures.

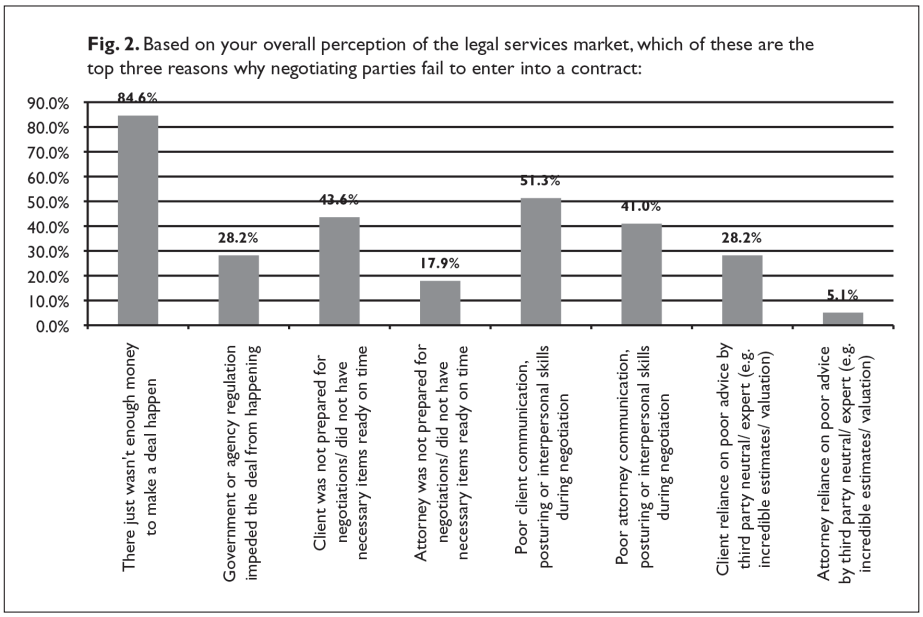
Survey Results & Discussion

As shown in the chart in **Figure 1**, when we asked the question: *"When negotiating a contract or structuring a deal, how often do you engage or consult the following types of third-party neutral who is not a member of your organization/ law firm?",* a strong majority of the survey respondents (between 73% to 93% in each subcategory) admitted to "seldom" or "never" using neutrals in any of the roles we investigated. However, there *are* nuanced differences that are worth noting. A combined total of 29.6% of the respondents reported that they "always," "often" or "somewhat often" consult a neutral/expert for appraisal or valuation matters without the presence of opposing counsel compared to only 7.2% of respondents who would consult the same neutral/expert for appraisal or valuation matters jointly with opposing counsel. These figures appear to confirm our first hypothesis. They also suggest that while most attorneys do not utilize neutrals to assist in their negotiations, those that do are more likely to independently seek expert neutral advice on technical matters such as valuation than on process matters such as conducting or facilitating the actual negotiation.

We did not find much support for our second hypothesis from the survey. When we asked respondents to gauge the likelihood of success for attorney-negotiated agreements, a strong majority (79%) of the respondents felt that attorney-negotiated agreements were likely or most likely to close successfully, and an additional 18.2% thought that such negotiations were somewhat likely to be successful. Because this particular question polled attorneys for negative behavior or outcome response, we could have perhaps rephrased the question to encourage candor or provided a different measuring scale. There is also no control-class against which we could compare the respondents' perceptions. It would be interesting to see if business leaders and sales directors share the same level of perception of whether their negotiations close more successfully when they negotiated with attorneys involved versus when they negotiate without attorneys. Nevertheless, if these responses can be generalized, the fact that attorneys perceive that their negotiations were likely to close successfully might explain why attorneys do not feel that they need to consult third party neutrals in the negotiation process.

However, we found some evidence of the need for attorneys to engage neutrals based on the respondents' perceptions about why negotiations fail. We asked respondents to indicate the top three reasons for why they believed negotiations fail from a menu of eight options or to suggest their own reasons. As **Figure 2** shows, an overwhelming majority (84.6%) of the respondents blamed insufficient cash or financing followed by poor client communication, posturing or interpersonal skills during negotiation (51.3%), and poor client preparation for negotiation (43.6%). In line with our hypothesis, 41% of the respondents blamed poor attorney communication, posturing or interpersonal skills during negotiation well ahead of any of the factors associated with third-party neutrals. As discussed below, neutrals — and especially mediators — help parties communicate more efficiently, appreciate the other side's viewpoint and explore creative solutions to "glitches" that may arise during the





negotiation process. This result suggests that parties might benefit from consulting a mediator in dealing with interpersonal and communication issues that cause problems during negotiations. Only 5.1% of the respondents thought that an attorney's reliance on poor advice by third party neutrals ranked in the top three reasons why negotiations fail.

Benefits of Consulting Neutrals and Using Mediation When Negotiating Agreements

1. *Merely suggesting a neutral can be an effective strategy.*

By proactively suggesting the use of mediators in the event that the parties disagree on components of the agreement, a party can reduce the likelihood that the other party will exit the negotiation before a neutral has had an opportunity to help the parties resolve the variance. For example, in a seller's market that is amenable to long-term repeat play, the buyer may strategically offer mediation as a show of strong interest that the buyer is willing to commit the necessary resources to make a deal happen.

2. *Neutrals can help the parties lessen their preexisting pessimism.*

Getting the parties to come to the table in good faith and with positive energy to make a deal happen is often one of the hardest steps in the negotiation process. Through cautious acts of trust building, such as brainstorming and creative problem solving, a credible third party neutral can help parties mitigate a poor relationship history that may otherwise torpedo the present deal. We have found from experience that, next to divorce settlements, negotiating buy-out agreements among owners of close corporations can be uniquely thorny, especially if the decision to buy or sell is preceded by prior interpersonal or business disagreements. On a number of occasions, disappointed former business partners engage in retaliatory and deleterious behavior during the pendency of the negotiation. A neutral with the right experience may provide the right coaching or push for leading the proverbial horses to water.

3. *Neutrals can help the parties plug unintended loopholes in their written agreements.*

When parties have exchanged drafts of the same agreement multiple times in the course of the negotiation, sometimes it takes a neutral with a fresh pair of eyes to glean costly scrivener's errors and ambiguities that may be grounds for invalidating or reforming the entire agreement. The recent dismissal of the Jacksonville Jaguars' General Counsel over a clerical error in the contracts of seven assistant coaches who were subsequently fired is a prime example. ESPN reported that a dispute over contracts that could cost the Jaguars more than $3 million in salary may have been a key factor that led to the dismissal of the team's Senior Vice President of Football Operations and General Counsel. The language in question related to contracts with assistant coaches and stated that their contracts "shall terminate on the later of January 31, 2012, or the day after the Jaguars' last football game of the 2012 season and playoffs ...." Apparently, instead of the "last game of the 2012 season," it was supposed to say "last game of the *2011* season." Consequently, the assistant coaches want to be compensated for the 2012 season, especially if they remain unemployed throughout the 2012 season. Submitting the final draft to a neutral before the parties execute the contract may ensure that a third party can ask the *"what do you mean by this provision"* types of questions to the parties jointly.

4. *Neutrals can help the parties account for the interests and rights of outsiders.*

In the excitement of nearing an agreement, parties to a negotiation sometimes lose sight of the ways in which the contemplated agreement may implicate the interests of non-parties. Oftentimes, these oversights have costly ethical and legal implications. Consider the service agreement entered into by Securus Technologies and Cook County Prisons concerning the sharing of revenue from phone calls made by inmates to their relatives. The contract permitted Securus to charge a steep fee of $15 per calls and required Securus to remit 57.5% (estimated about $12 million in three years) of the revenue from inmate phone calls back to the county. Much of that money is paid by the largely poor families

of inmates, many of whom cannot afford to post bond to free their loved ones from jail while they are awaiting trial. Eight states have banned revenue-generating jail phone contracts since the Securus-Cook County contract was made public.

5. *Neutrals can bring expertise to steer the negotiation process.*

Some neutrals are experts in particular areas of law or business and can bring this expertise to assist the parties. In most international arbitration proceedings, it is quite common that the panel of arbitrators includes non-attorney experts in the subject matter of the dispute. Parties can also save money by sharing the cost of hiring the same evaluator or appraiser. Neutrals act much like appraisers in a mediation context because they can sometimes advise parties objectively on what they think of an offer or demand. A mediator can act like a surrogate providing an additional channel to help a party communicate to the other side the amount of work, diligence, and accuracy with which a party's analysis was performed.

Conclusion and Implications for Practice

Although the thrust of our focus has been on how attorneys negotiate, to realize our goals mediators would have to be willing to expand their practice beyond the traditional realms of resolving disputes and legal claims. As an initial matter, one has to inquire whether traditional protections afforded to the mediator under her traditional roles will run with the mediator into this new role. The Uniform Mediation Act, as adopted by the State of Ohio, defines mediation as "any process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement *regarding their dispute*." Whether the meaning of "dispute" under O.R.C. §2710.01 requires a live case and controversy or a conflict of claims and rights in order to trigger the protections afforded to mediators under the Code has implications for immunity of the mediator from civil suits as well as protection from disclosure of mediator's communication in subsequent proceedings.

The attorneys who took part in our pilot survey have provided us some insights into how attorneys prepare for and conduct negotiations. We found support for two of our three hypotheses. However, given the small sample in our survey's effective pool, we caution against generalizing this result to the entire legal services market. We recognize that empirical legal research has its unique challenges, one of which is how to best communicate complex statistical results to a community of professionals with minimal statistical training. We have therefore focused on presenting descriptive statistics without making inferences about the relationships in our data. Future studies could perhaps add to the body of existing knowledge by comparing negotiation trends amongst attorneys and industry leaders; between female and male attorneys; and in what ways, if any, that organization type and practice experience shape attorney disposition to using or consulting mediators.

Peggy Foley Jones is a member in the law firm of Giffen & Kaminski, LLC. Her practice focuses on mediation, arbitration, and private judging. Prior to joining G&K, she served as a judge for the Cuyahoga County Court of Common Pleas. She also serves as a coach and trainer on the topics of negotiation, mediation, and arbitration and is a frequent speaker and presenter on topics of ethics, diversity, and dispute resolution. She can be reached at (216) 621-5161 or pfjones@thinkgk.com.

Obiajulu C. Okuh is the 2011 Inamori International Center for Ethics & Excellence Fellow at Case Western Reserve University. He was a law and ADR clerk at Giffen & Kaminski, LLC. Obie is an affiliate member of the International Ombudsman Association, member of the Young International Arbitration Group and the Young Arbitrators Forum (YAF) of the ICC. He can be reached at (202) 455-8496 or oco@case.edu.