TOOLKIT 4

Resolving Corporate Governance Disputes

VOLUME 3 : TRAINING

Global
Corporate
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Forum

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VOLUME 3 : TRAINING
MODULE 1 : What Skills Are Needed for Corporate Governance Dispute Resolution?

3.1

Having directors with dispute resolution skills on the board can make a tremendous difference on how corporate governance disputes are handled. With the right dispute resolution skills, the board can establish an effective process for surmounting opposing views and steering the company towards its strategic objectives. Without such skills, board deliberations may deteriorate as factions emerge, antagonism permeates directors' relations, and resentment builds up.

Not everyone is suited to serve as a mediator, peacemaker, or consensus-builder. Some personalities lend themselves better to these roles than others. Yet all directors - especially board leaders should strive to adopt interpersonal skills required for effective dispute resolution.

At times, boards will need to draw on third-party expertise to facilitate difficult conversations and untangle disputes within the boardroom or with external stakeholders. To be effective, third-party experts must have sufficient experience, expertise, and knowledge of corporate governance to deal with the complexity of corporate governance issues. Peacemakers typically listen well to others, are patient, command trust and respect, and have sensitivity both to governance dynamics and the very human and emotional issues that may underlie disputes.

THIS MODULE REVIEWS

- ‣ Directors' conflict management styles
- ‣ Directors' dispute resolution skills
- ‣ Third-party dispute resolution styles and ethics
- ‣ Third-party dispute resolution skills
- ‣ Third-party understanding of corporate governance dynamics

MODULE 1
WHAT SKILLS ARE NEEDED FOR CORPORATE GOVERNANCE DISPUTE RESOLUTION?

DIRECTORS' DISPUTE RESOLUTION SKILLS

Discourse and debate are at the heart of the board's work and essential in making decisions, guiding the company, and ensuring that shareholders' interests are well-served.

Decisions should result from a process in which directors consider all the information available to them and engage in productive, vigorous, and focused discussions. Directors should be fully involved in these discussions,

> ## " QUOTE
>
> ### Difficulties Communicating During Conflict
>
> *"As conflict emerges, we stop and take notice that something is not right. The relationship in which the difficulty is arising becomes complicated, not easy and fluid as it once was. We no longer take things at face value, but rather spend greater time and energy to interpret what things mean. As our communication becomes more difficult, we find it harder and harder to express our perceptions and feelings. We also find it more difficult to understand what others are doing and saying, and may develop feelings of uneasiness and anxiety. This is often accompanied by a growing sense of urgency and frustration as the conflict progresses, especially if no end is in sight."*
>
> **JOHN PAUL LEDERACH**
> PROFESSOR OF INTERNATIONAL PEACEBUILDING
> UNIVERSITY OF NOTRE DAME, INDIANA
>
> *SOURCE: John Paul Lederach, "Conflict Transformation." October 2003. Available at: http://www.beyondintractability. org/essay/transformation/?nid=1223.*

with procedures established to guard against dominance by one voice, particularly when decisions are being made.

Good board practices, such as clear objectives for meetings and shared norms, help to prevent misunderstandings and facilitate collegiality. The quality of board discussions, too, depends on directors' individual efforts to communicate their information to others and to be good listeners.[1]

Differences of opinion and judgment are inevitable during board deliberations. However, tensions may escalate, immobilizing the board — especially when the stakes are high and the company is making difficult strategic decisions. Directors may support positions based on power politics and personal agendas rather than on an issue's merits. When board relations become dysfunctional, opposing moves by directors tend to be interpreted as additional evidence justifying the impulse to be distrustful. A director may feel that, no matter what they say or do, they will be perceived as being wrong and their efforts will not be appreciated.

A dispute often takes a life of its own. It could be a minor tension that is easily resolved. At the other extreme, it could be an escalating "war" of words and actions that exacts tremendous costs and leaves disputants with emotional, professional, and other "scars" — harming the company in tangible and intangible ways.

> TO REVIEW THE CONSEQUENCES AND IMPACT OF CORPORATE GOVERNANCE DISPUTES, SEE VOLUME 1 MODULE 2.

At a dispute's onset, the relations among the parties involved tend to be strained as communications become more difficult. Perceptions of the issues and solutions may differ, based on cultural, personal, political, psychological, and other factors. Different levels of expertise, personal skills, intellect, and commitment also

shape a dispute's dynamics and each party's participation and influence. Emotions may enter into disputants' conduct particularly as self-confidence, the need to dominate and "win," one's sense of one's esteem and "rank," and other psychological issues converge to shape disputants' perceptions and behavior. These emotions add to the substantive disagreements and the actions that disputants pursue. Toleration for hostility, aggressiveness, or disrespect may exacerbate tensions among directors.

For boardroom debates to remain orderly and discussions with external stakeholders to be constructive, directors must understand and apply dispute resolution skills. Although some directors may have a natural talent for ironing out disputes among their peers, other directors will require training to:

- Understand the dynamics of corporate governance disputes

- Evaluate the risks and consequences associated with such disputes

- Become aware of one's personal conflict management style

- Build dispute resolution and interpersonal skills

- Develop sensitivities to cultural issues

- Learn ADR processes and techniques

- Know when to seek third-party help for managing and resolving internal and external governance disputes involving shareholders and/or other stakeholders
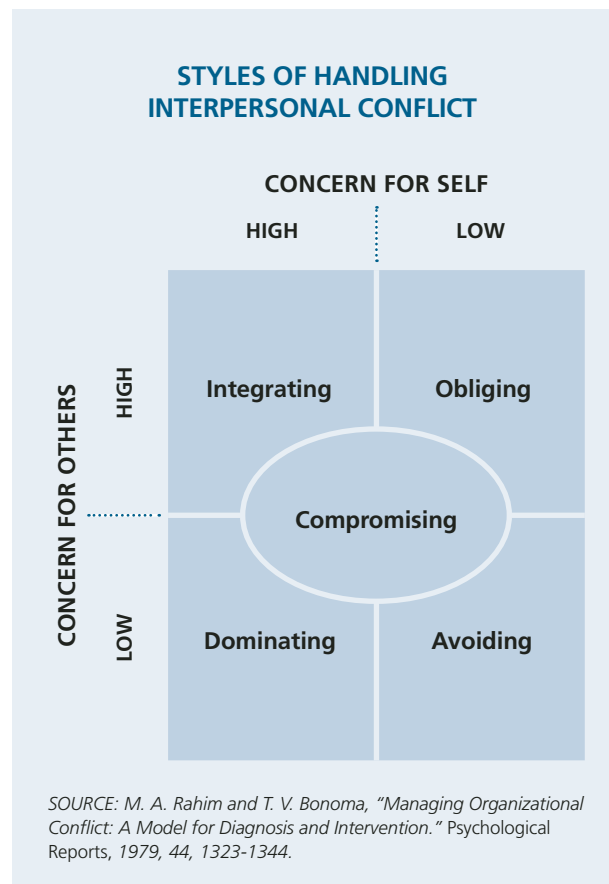
Conflict Management Styles

Conflict management literature provides many guidelines on how interpersonal conflict in organizations can be handled to maximize individual, group, or organizational effectiveness. To effectively and constructively prevent and manage corporate governance disputes, boards and

directors must understand their conflict-management styles. In 1979, researchers Afzalur Rahim and Thomas Bonoma[2] differentiated the styles of handling conflict using two basic dimensions: **concern for self** (also referred to as "assertiveness") and **concern for others** (also referred to as "concern for relationship"). The first dimension explains the degree (high or low) to which a person attempts to satisfy his or her own concerns. The second explains the degree (high or low) to which a person attempts to satisfy others' concerns.

The combination of these two dimensions results in five specific styles for handling interpersonal conflict:

- *Integrating* (high concern for self and others). This style, also referred to as *collaborating or cooperating,* is associated with problem-solving. This approach involves openness, exchanging information, looking for alternatives, and examining differences to reach an effective solution acceptable to both parties. This style is often described as a "win-win" approach that

STYLES OF HANDLING INTERPERSONAL CONFLICT

SOURCE: M. A. Rahim and T. V. Bonoma, "Managing Organizational Conflict: A Model for Diagnosis and Intervention." Psychological Reports, 1979, 44, 1323-1344.

satisfies the concerns of both parties and is associated with functional outcomes. A board whose dominating style is *integrating*, which is consistent with corporate governance best practice (namely, board members discuss and debate strategic decisions in a company's best interests).

- *Obliging* (low concern for self and high concern for others). This style, also referred to as *accommodating* or *harmonizing,* is associated with efforts to play down the differences and emphasize commonalities to satisfy the other party's concerns. An obliging person neglects his or her own concerns to satisfy others' concerns. This style is often described as a "lose-win" approach that satisfies the other party's concerns and is associated with functional outcomes. This style is typical for family firms' boards, where family members on the board defer to the founder. Interdependent relationships — directors serving on each other's boards — among peers may result in decisions based less on merits and more on nurturing those relationships. Directors, as fiduciaries, may not put personal interests and duties before the duties they owe to the company. Legal liabilities and time commitments may constrain directors' involvement in board discussions and actions, resulting in their being "obliging."

- *Compromising* (intermediate in concern for self and others). This style involves "give-and-take;" both parties give up something to forge a mutually acceptable decision. This style reflects board practice in which directors have the best interests of their constituencies at heart but follow well-established decision-making processes.

- *Dominating* (high concern for self and low concern for others). This style, also referred to as *"competing"* or *"directing,"* has been identified with win-lose orientation or with forcing behavior to win one's position. A dominating, highly assertive or aggressively competitive person works hard to win his or her objective and, as a result, often ignores other parties' needs and expectations. This approach is associated with dysfunctional outcomes. This style is predominant in boards where a director, but more typically the chairman or the CEO, may dominate

the decision-making process and leave little room for debate and discussion. A chairman/CEO "cult" may prevail, resulting in directors' deference and reluctance to challenge "unanimous" decisions. Boards with more than one dominating personality are fertile terrain for disputes.

- *Avoiding* (low concern for self and others). This style has been associated with withdrawal or sidestepping situations. An avoiding person fails to satisfy his or her own concerns and those of the other parties. This style is often described as a "lose-lose" approach that does not satisfy either party's concern and is associated with dysfunctional outcomes. This style is predominant in passive or non-active boards where directors mainly rubber-stamp functions.

The literature indicates that the more cooperative conflict management styles, such as *integrating* and *obliging* (in which a meaningful amount of concern is shown for the other party), are likely to produce positive individual and organizational outcomes, while such antagonistic styles as *dominating* and *avoiding* (in which little concern is shown for the other party) frequently result in escalation of conflict and negative outcomes.[3]

In his conflict style inventory, author Ron Kraybill, explains that conflict management styles correspond to an individual's way of responding to conflict with others based on his or her preferences and habits.[4] There is no right and wrong style. Each conflict management style has its own strengths and weaknesses. Board members must be aware of their personal style and those of the other board members. When individuals do not know their preferred style, they run the risk of running on "autopilot" and reacting blindly. Directors who are aware of their own conflict management preferences, as well as those of the board, can make better choices. For example, directors should take time to connect with individuals who have an obliging style before settling down to serious business. When dealing with an individual whose style is avoiding, it is conversely important to give him or her adequate time to review both statements and documents and to take special care in engaging them in board discussions, and thereby benefit from their viewpoints.

Conflict Management Style Questionaire

For each statement below, check the appropriate column, as it applies to your actual behavior on the board.	TRUE *4 POINTS*	SOMEWHAT TRUE *3 POINTS*	SOMEWHAT FALSE *2 POINTS*	FALSE *1 POINT*
1 I look at issues with others to find solutions that meet the company's best interests.				
2 I try to negotiate with board members and adopt a give-and-take approach to contention situations.				
3 I try to meet the expectation of the chairman and committee chairs.				
4 I argue my case and insist on the merits of my views.				
5 When there's disagreement, I ask questions and stay engaged with all board directors.				
6 When I find myself in an argument, I usually say very little and leave as soon as possible.				
7 I try to see conflict from both sides: I reflect on personal and directors' needs.				
8 I prefer to compromise when dealing with contentious issues and move on to the next agenda item.				
9 I find conflicts over strategic issues challenging and stimulating: I enjoy the battle of wits.				
10 Being at odds with other board members makes me feel uncomfortable and anxious.				

For each statement below, check the appropriate column, as it applies to your actual behavior on the board.	TRUE 4 POINTS	SOMEWHAT TRUE 3 POINTS	SOMEWHAT FALSE 2 POINTS	FALSE 1 POINT
11 I try to accommodate shareholders' wishes and the interests I represent on the board.				
12 I can easily figure out the decisions that need to be taken. I am usually proven right.				
13 To help break deadlocks on important decisions, I am willing to help meet others halfway.				
14 I avoid hard feelings by keeping my disagreements with other directors to myself.				
15 I may not always agree with the decisions taken at board meetings, but it is a small price to pay for keeping the board's peace and harmony.				

In the chart below, add the points for each statement as indicated. The row with the highest score indicates your most preferred conflict management style.

The row with the lowest score indicates your least preferred conflict management style.

Competing	Total points for statement 4+9+12 =
Avoiding	Total points for statement 6+10+15 =
Compromising	Total points for statement 2+8+13 =
Accommodating	Total points for statement 3+11+14 =
Collaborating	Total points for statement 1+5+7 =

SOURCE: Adapted from Timothy F. Dowty, My Counseling Site. Available at: http://www.my-counseling-site.com/conflict_resolution_questionnaire.html.

Board retreats and self-assessment sessions can serve as appropriate venues to discuss directors' conflict-management styles and preferences and to help deal constructively with existing or potential differences. When individuals know and understand each other's style, they are less combative, if not reactive. They are more likely to be patient with each other's responses.

Dispute Resolution Skills and Expertise

In managing the board's business and acting as its facilitator and guide, the chairperson (or lead director) must encourage productive board discussions and manage disputes. While conducting meetings, he or she stimulates debate, builds consensus, and ensures that disagreements are resolved constructively and in the company's (and shareholders') best interests. This creates an environment that encourages the directors to work together. The chairperson maintains control of proceedings without dominating discussions; each director is treated equally. Skillful questioning helps clarify issues and encourages the directors' full participation.

TO REVIEW THE ROLE OF THE BOARD IN PREVENTING AND RESOLVING CORPORATE GOVERNANCE DISPUTES, SEE VOLUME 2 MODULE 1.

Being particularly attuned to board relations, the chairperson (or lead director) is typically expected to mediate between disputing directors. In some cases, a talented board member proactively serves as peacemaker by convincing directors to settle their differences with his or her assistance. Ultimately, all directors should be able to strengthen the board's corporate governance through dispute resolution practices. The board is collectively responsible for managing disputes in a timely, constructive manner. Enhancing the board's dispute resolution skills is a dynamic process, requiring board leadership and the willingness to learn and adapt.

Directors — especially those who have a collaborative conflict-management style — commonly draw on mediation techniques without always being aware of doing so to find common ground. Such peacemakers will ask questions, listen attentively, and encourage parties to resolve differences. They strive to bring clarity, improve communications, and re-focus attention on the company's interests. With the assistance of peacemakers, board directors, but also investors and other stakeholders, search for acceptable solutions to conflicting positions.

QUOTE

The Loquacious Director

"You may have a loquacious director, the fellow who's so articulate he feels he has to expound on every subject, sometimes even on both sides of the subject. I've had to give this kind of feedback: 'Sir, here is what your board is telling you. Your fellow directors love you, but you're so articulate that you intimidate them.'"

WILLIAM HOLSTEIN
COLUMNIST, "ARMCHAIR MBA"

SOURCE: William J. Holstein, "The Problems with Boards." Business Week, December 27, 2007. Available at: http://www.businessweek.com/managing/content/dec2007/ca20071227_236732.htm.
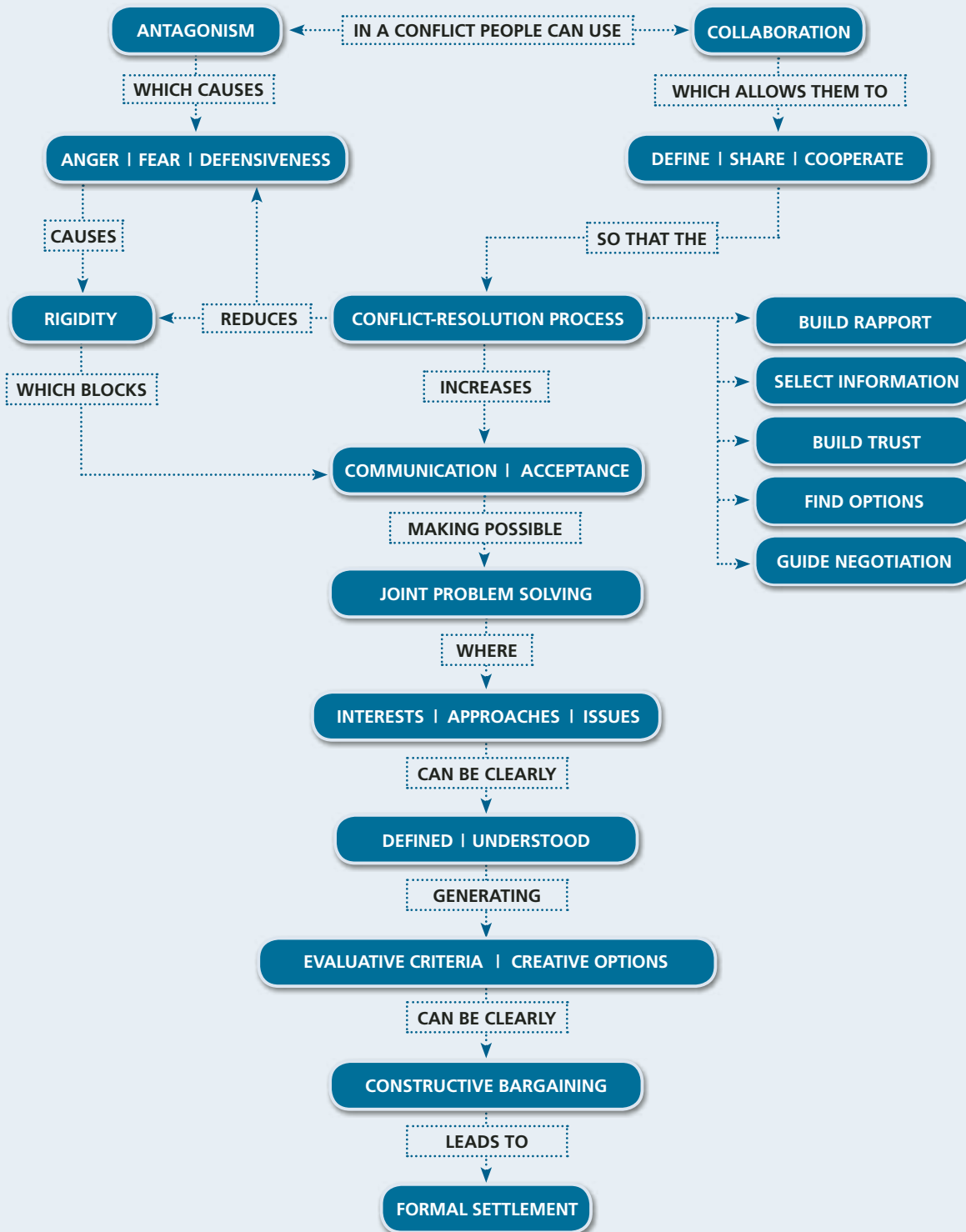
QUOTE

Successful Board Leaders

"It is the interpersonal skills of the diplomat that are paramount for helping directors and management find mutually acceptable solutions to common challenges. And because these skills are so subtle and don't always come with the job description, it is hardly surprising that choosing a lead director can be one of the most difficult decisions a board can make."

THEODORE DYSART
MANAGING PARTNER
HEIDRICK & STRUGGLES

SOURCE: Theodore Dysart, "Becoming a Super Lead Director." Directorship. October/November 2008. Available at: www.directorship.com/media/2010/09/2010-DIRECTORSHIP-100.pdf.

DYNAMICS OF DISPUTE RESOLUTION

ANTAGONISM ← IN A CONFLICT PEOPLE CAN USE → **COLLABORATION**

WHICH CAUSES

WHICH ALLOWS THEM TO

ANGER | FEAR | DEFENSIVENESS

DEFINE | SHARE | COOPERATE

CAUSES

SO THAT THE

RIGIDITY ← REDUCES ← **CONFLICT-RESOLUTION PROCESS** → **BUILD RAPPORT**

WHICH BLOCKS

INCREASES

→ **SELECT INFORMATION**

→ **BUILD TRUST**

COMMUNICATION | ACCEPTANCE

→ **FIND OPTIONS**

MAKING POSSIBLE

→ **GUIDE NEGOTIATION**

JOINT PROBLEM SOLVING

WHERE

INTERESTS | APPROACHES | ISSUES

CAN BE CLEARLY

DEFINED | UNDERSTOOD

GENERATING

EVALUATIVE CRITERIA | CREATIVE OPTIONS

CAN BE CLEARLY

CONSTRUCTIVE BARGAINING

LEADS TO

FORMAL SETTLEMENT

CONFLICT RESOLUTION SKILLS LADDER

UNSKILLED INDIVIDUAL		SKILLED INDIVIDUAL
	Can negotiate a win-win solution	
• Inflexible • Personal needs dominate • Tries to use power to dominate (through aggression) or withdraw to engage sympathy	**6**	• Flexible • Open-minded • Assertive to look after personal interests
	Can generate various solutions	
• Limited to "fight or flight" options • Focuses exclusively on own interests • Argues for a position (which can be disguised as interests)	**5**	• Generates a variety of options • Finds options that include both parties' interests
	Can empathize/take perspective	
• Unaware of others' feelings • Cannot read feelings accurately • Cannot "hear" the other person's interests • Sees the other as "bad guy" • Believes empathy means agreement	**4**	• Accurately reads others' emotions • Responds sensitively a appropriately • Listens to others' interests • Knows the difference between empathy and agreement
	Can identify and express own interests	
• Only expresses their position (advocated solution)	**3**	• Knows the difference between positions and interests • Expresses own interests in terms of wants/needs/fears/concerns
	Can verbally express own thoughts and feelings	
• Cannot verbalize own thoughts and feelings • Unaware of own thoughts and feelings (blames others)	**2**	• Has a large feelings vocabulary • Can identify own thoughts and feelings • Can experience emotion without losing control
	Can contain/manage strong emotions	
• Cannot contain/manage emotion • Yells, screams, fights, dissolves into tears, withdraws	**1**	• Can experience emotion without losing control
	CONFLICT	

Directors' Interpersonal Conflict Management Skills

Interpersonal skills are all the behaviors and feelings that influence interactions. Directors' job descriptions should include a section on interpersonal skills. These should include:

► Communicating effectively

- Active listening

- Assertive expression

► Instilling trust and confidence

► Respecting cultural sensitivities

► Building consensus

► Managing emotions

► Disagreeing constructively

► Learning agility

► Self-motivation

INTERPERSONAL SKILLS

LEADERSHIP
Monitoring
Decision-Making
Delegation
Motivating Others

NETWORKING
Self Confidence
Network Building
Effective Communication

TEAMWORK
Monitoring
Groupwork
Decision-Making
Delegation
Collaboration

SOURCE: University of Sydney. Available at: http://www.sydney.edu.au.

Throughout a dispute cycle, certain interpersonal skills and expertise can help board directors engage and manage tensions. These typically include:

Communicating Effectively

Effective communications among directors, with senior management and external constituencies, is essential for productive board work. Effective communications facilitates dialogue, engagement, and reduces obstacles toward solutions. Further, it helps prevent misunderstanding and narrows the disagreement's confines. "The leader must be able to share knowledge and ideas to transmit a sense of urgency and enthusiasm to others," said Gilert Amelio, President and CEO of National Semiconductor Corporation. "If a leader can't get a message across clearly and motivate others to act on it, then having a message doesn't even matter."

Communicating well starts with active listening. Good communicators are good listeners; being attentive and receptive to others' views helps to ensure collaborative, two-way communications. Active listening helps directors collect facts and information, assess situations accurately, and feel that they are being heard. Active listening involves rephrasing statements in a constructive manner and requires reading non-verbal cues, such as eye contact, voice tone, and facial expressions to understand intentions. Such skills as active listening and open-ended questioning (versus closed yes/no questions) may seem easy. In fact, the appropriate application of these skills requires careful observation, good judgment, and excellent timing. Re-phrasing statements in a constructive manner is not just using the right words or phrases but also includes engaging others to determine a common vision.

Communicating well also involves assertive expression. Directors need to clearly articulate their views so that all parties understand their points and are unlikely to misconstrue statements and opinions. This requires a good vocabulary that enhances one's diplomacy in articulating thoughts and debating with those holding contrary views.

Communicating well, furthermore, includes being aware of tone and body language and what it may communicate

to others. According to a study conducted by Albert Mehrabian in 1971,[5] face-to-face communications can be broken down to three elements: nonverbal, tone, and words. Words only make up for 7% of the communication while nonverbal cues 55% and tone 38%. This suggests that what an individual says is only a small fraction of what people hear. In the context of the boardroom, the root of most misunderstandings and continuing disagreements is based on the following four fatal assumptions:[6]

- Participants understand what has been communicated

- Participants agree with what has been communicated

- Participants care about what has been communicated

- Constituents know how to act according to what has been communicated

One of the biggest mistakes in executive communications is to take for granted how others receive what is being communicated. People exposed to the same information can end up with completely different ideas and understandings. This is why the process of perception — how individuals receive, organize, interpret, and retain information transmitted to them from another person — can be a key obstacle. The communications process is also complicated by the tendency of people to fill in the gaps — the process of closure — where information is missing with information consistent with what they already know, even if that information is neither relevant nor correct.

Instilling Trust and Confidence

It is common for people that work together, such as board members, to have a degree of trust and a degree of distrust about each other, simultaneously. Impartial board practices, such as ensuring that directors have fair

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FOCUS

Blocks to Effective Communications

The following attitudes constitute obstacles to effective communications. They can divert meetings from their objectives, create frustration, fuel resentment, and lead to open, unconstructive disagreement. These include:

▶ Interrupting

▶ Arguing

▶ Being condescending

▶ Lecturing

▶ Being moralistic

▶ Preaching

▶ Being judgmental

▶ Outdoing others

▶ Monopolizing conversations

GLOSSARY

Communications Frames

Choosing the right words is imperative to be an effective communicator. Words are deeply imbedded with images, emotions, and associations accumulated from individual and collective life experiences, creating "frames." Through these frames, people sift and process information, make judgments, and draw inferences about the world around them. Frames shape how we understand, interpret, and communicate.

Mastering the right lexicon based on words' unique frames can turn unpersuasive messages into persuasive ones, deepen engagement with key stakeholders, and strengthen trust in the process. Knowing how people 'hear' what we 'say' helps to ensure that messages are more clearly conveyed while narrowing the potential for misunderstanding, argues communications expert Frank Lunz. This demands that messages are credible, simple, brief, consistent, visual, and inspirational.

SOURCE: Frank Luntz, Words that Work: It's Not What You Say, It's What People Hear. New York: Hyperion Press, 2007.

opportunities to present their views, are most effective in developing trust and ultimately, consensus. Regardless of their position on the board, directors engaged in managing and resolving disputes must instill trust and confidence and be perceived as fair and impartial in the dispute resolution process — no matter how informal that process may be. Part of that trust, one lead director explains is "the confidence on the part of the other board members, and management that the message delivered won't be filtered by the messenger's biases." As the journalist Edward R. Murrow wrote: "To be persuasive, we must be believable; to be believable, we must be credible; to be credible, we must be truthful."

This set of skills requires knowing how to relate to others, to read people, and to find the basis for mutual respect, camaraderie, and, when needed, team-building.

Respecting Cultural Sensitivities

Culture is a set of learned beliefs and behaviors that shape the ways in which individuals and groups view and experience the world. Historical-political factors rooted in conflicts outside the boardroom can lead to stubbornness, blame, and rigidity in discussions.

Each person — including directors — brings to their social encounters unique worldviews, local perspectives, and behaviors shaped by the culture of their origin, which are learned in childhood and evolve through various affiliations (e.g., religion, ethnicity, class, and voluntary and professional organizations).

When the board's composition includes talented directors with varied technical, ethnical, social, and cultural backgrounds, the board is more likely to question assumptions and to weigh various consequences, leading ultimately to more far-sighted decisions. Diversity on the board is an asset. Indicators of the board's diversity remind individuals that differences of opinion are likely, and this expectation increases innovative thinking and the capacity to handle conflict. As a consequence, corporate governance disputes may be deepened by cultural differences.

Whether dealing with internal or external disputes, cultural skills are heavily dependent on observation skills and sensitivity to colleagues' perceptions of respect. During board meetings, for example, some directors may be time-conscious, efficient, and task-oriented. For them, time-management is a feature of professional practice. Other directors may place higher value on board hospitality and relationships.[7] From this perspective, strong emphasis on board tasks and efficiency is uncultured and disrespectful.

The most difficult problems to overcome are not about behaviors, such as whether to shake hands, but, instead, about those cultural issues related to shared and enduring values and beliefs associated with a particular group or community. Board directors should be cognizant that cultural differences may become obstacles to agreement when one party fears that the other will seek to impose values or beliefs as a form of domination. A minority

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" QUOTE

Culture Frames

"Culture is inextricably linked to the way people communicate because communication is largely dependent on perception. Our culture forms our frame of reference through which we interpret events, feelings, thoughts, and information. Hence our interpretation of reality is determined by the way we view the world, our beliefs and values. Culture forms the backdrop… of any interaction between people."

SHARANYA RAO
ASSOCIATE DIRECTOR OF PROGRAMS, ENVISION EMI INC.

SOURCE: Sharanya Rao, "The Cultural Vacuum in Online Dispute Resolution." Available at: http://www.odr.info/unforum2004/rao.htm.

person often fears dominance by a high-status group, and any sign of cultural superiority (or disrespect for minority values) is a potential threat.[8]

Building Consensus

Chairmen and lead directors especially need to facilitate discussions to encourage directors to "sign on" to standards of excellence in board practice and abide by their common agreement. Boardroom debate is essential but not an end itself. The chairman must ensure that issues get resolved and decisions are reached to allow the company to act. Decision-making should occur through consensus, a voluntary agreement following the deliberation and synthesis of different propositions. Generally, consensual decisions are less divisive than voting, which require directors to take opposing "yes" or "no" positions. However, the process tends to take a longer time than voting.

Consensus-building should not be confused with "groupthink," where directors follow the general trend of thought without questioning decisions. Consensus-building is about helping directors who hold opposing positions at the outset to come to a mutually beneficial and sometimes innovative agreement. As the poet Ralph Waldo Emerson once wrote: "Do not go where the path may lead; go instead where there is no path and leave a trail."

Skills contributing to consensus-building include:

- Open-ended questioning

- Respectful, effective communications

- Active listening

- Bringing issues to the surface

- Analyzing to deepen understanding and find patterns for organizing the information

- Describing common concerns

- Generating alternative solutions

- Prioritizing options using a cost/benefit assessment

- Agreements that monitor results, with contingencies

Consensus-building can occur outside board meetings in retreats and executive sessions. The chairman, lead director, or board member who acts as a peacemaker, may need to work behind the scenes and organize private meetings to find common ground. This requires time and commitment. Helping all parties converge towards a solution demands effective leadership, exerting one's formal and informal authority.

Managing Emotions

Emotions are intrinsic to conflict although not readily apparent — especially in the boardroom. In conflict, emotions are frequently translated into something more acceptable, such as making judgmental statements ("you are mistaken"), attributing intentions to others ("you refused to disclose this information to me"), or serving up solutions ("this is what needs to be done"). Directors need to be aware of any biases. Strong analytical skills and the ability to isolate emotional issues from substantive ones are essential in any business role, but are particularly critical in resolving disputes. Directors with strong interpersonal skills will find it easier to uncover sources of internal or external disputes, particularly when related to others' behavior. One should separate personal issues, personality traits, and emotions from corporate governance issues.

Yet, in many cases, the solution to a conflict will be difficult without acknowledgement of the feelings in play. This doesn't mean that directors should be "emotional" but that solutions to disputes require communicating feelings professionally before refocusing disputants on their fiduciary responsibility to act in the best interests of the corporation and its shareholders. R. Fisher and D. Shapiro share the following five tips for positively influencing the emotional climate during a conflict:[9]

- *Show appreciation for all parties.* This can be done by demonstrating an understanding for others' positions, recognizing the value of what they think, feel, or do. This does not mean that we have to agree with their position.

Managing Conflict through De-escalation Techniques

De-escalating Disagreements:

► Listen attentively, show interest, and use open-ended questions.

► Manage time with balanced opportunities for opposing parties to express views.

► Minimize interruptions, blocking.

► Avoid the polarization of opinions. Elicit diverse perspectives from impartial directors.

De-escalating Avoidance:

► Ensure that all board members have opportunities to communicate concerns within the board meeting.

► Ask open-ended ("What are your thoughts about...?") questions of directors that act concerned yet seem reluctant to participate.

De-escalating Contentious Behavior:

► Stay calm, and be aware of body language and tone.

► State clearly practical and strategic objectives. Re-focus the discussion on constructive ideas and practical suggestions.

► Inventory document concerns. Request fact-finding questions.

► Take a break, or re-schedule discussions.

► Agree to disagree, or to address more difficult topics with the help of a respected third-party expert at a later date.

De-escalating Accusations:

► Stop personal attacks. Re-focus deliberations on the company's best interests and corporate governance procedures.

► Help reformulate ideas or statements. (Speak on behalf of self, using "I" statements. Identify concerns. Recognize uncertainty.)

► Take a break, or re-schedule discussion, as necessary.

► Determine an appropriate time and place to enforce board procedures and practices.

De-escalating Bullying:

► Review board norms and practices at the meeting's beginning.

► Determine an appropriate time and place to approach the aggressive party separately. Take appropriate action to prevent a repeat of aggressive behavior.

- *Create a bond.* This can be done by sharing information about common interests, asking about personal aspects.

- *Respect the parties' autonomy.* People like to make independent decisions. Give others the space to express their views. People who talk too much, for example, can threaten the others' autonomy.

- *Acknowledge the other party's status.* Status helps clarify one's position vis-à-vis the others.

- *Highlight the other party's role.* Board directors each play an important role. Each role must have substance, and the directors must be respected for their roles.

Disagreeing Constructively

At times, a board director has a serious concern about a board decision or the standards upon which the decision was made. Constructive dissent is the ability to challenge the majority view in a useful way. This skill can help prevent or limit "groupthink," the excessive group cohesion that precludes dissent and sound decision-making. The risk to an individual who challenges "groupthink" is that the majority will be critical and try to silence or pressure the "outlier" to cooperate. Disagreeing constructively requires courage and effective assertion. Various methods are used to pressure someone into agreement, including discounting expertise or using statements such as, "be a team player." Directors sometimes compromise their values and professional standards to maintain friendly, cohesive relations within the dominant group. The easiest response is to fall silent, hoping that another director will take a leadership role in addressing the issue.

A clear understanding of corporate governance respon-sibilities (and liabilities) will strengthen a director's resolve in challenging the board's majority opinion. The company secretary's documentation of dissent during board meetings provides procedural support for directors who dissent, as there is a record of the topic, the risks identified, and the board's responses.

Constructive dissent is most effective when proposed with careful preparation. A director is more likely to gain serious attention when presenting information with

confidence using facts, examples, comparisons, and risk assessments. The company secretary is a vital resource for guidance regarding procedural matters, regulations, and precedents. Skills required to challenge a majority view include:

- Offer a concise statement of concern and proposal

- Offer factual support

- Provide clear examples

- Demonstrate active listening

- Respond with constructive feedback

Preparations may also include talking with the chairman in advance of the meeting to avoid surprises. If the board does not respond to the informed concern, with evidence of risk, a director may lobby others after the meeting, ask for an expert informant's assistance, seek a mediator, or, if warranted, resign from the board.

To properly and usefully apply interpersonal skills, directors must have:

- The appropriate industry or technical skills and understand their roles and responsibilities. A mastery of the issues facilitates disputants' ability to avoid obstacles resulting from poor preparation and confusion over terminology and other substantive matters.

- The willingness to devote enough time to planning and follow-up meetings outside the boardroom, to address those issues that may threaten board relations. Studies show that the amount of time directors devote to board matters is on the rise. One study shows that the time directors dedicate on average to their directorship in the United States went from 156 hours in 2001 to more than 200 hours in 2007.[10] This number considerably increases during crises and disputes.

Directors should also be aware of the obstacles that may prevent effective dispute management and resolution. "Disputants may stick to unrealistic reference points, may be subject to 'anchoring effects,' self-serving biases,

**Assessing the Board's
Interpersonal Skills**

Board retreats provide opportunities to assess individual and collective interpersonal skills and expertise that improve governance practices and help manage disputes. The set of questions below can be used as a guideline to assess those skills:

- Are the board directors effective communicators?

- What are their respective strengths and weaknesses?

- Are board discussions focused yet sufficiently open to allow a broad range of viewpoints?

- Are there opportunities for individual board members to make presentations and lead discussions, particularly those relevant to their committee responsibilities and areas of expertise?

- Does the chairman balance the extroverts and introverts to ensure open participation in board deliberations?

- Do board directors relate well to one another and senior management?

- If not, what are the problems and their sources?

- Are there social, cultural, political, economic, or personal reasons creating tensions among board members and senior management?

- Have tensions among directors obstructed the board's ability to function? If so, why? What steps has the board taken to defuse personal animosities among board directors?

- Does the process that the chairman or lead director use to consider issues provide opportunities for reflection, analysis, debate, and consensus-building?

and 'reactive devaluation.'"[11] Some of the most common obstacles include:

- *Anchoring effects.* This common human tendency refers to a reliance on an "anchor," one trait or piece of information when making decisions. Placing too much importance on an "anchor" tends to cause errors in accurately predicting the utility of a future outcome. "Knowledgeable people are less susceptible to basic anchoring effects; anchoring appears to operate unintentionally and unconsciously."[12]

- *Self-serving biases.* There is a human tendency to make systematic errors in judgment, knowledge, and reasoning, biases that result partly from information-processing shortcuts. Self-serving biases, or illusory superiority, refer to tendencies to claim more responsibility for successes than failures and to evaluate ambiguous information in a way beneficial to personal interests.

- *Reactive devaluation.* Reactive devaluation happens when individuals try to create a mutually beneficial deal but find reasons to devalue the other party's offer once the negotiation begins. The devaluation of seemingly reasonable offers creates a barrier to further negotiation and settlement. "Research on reactive devaluation has consistently and convincingly shown that negotiators devalue objectively identical offers when they are made by the other party rather than by one's own party."[13] ■

THIRD-PARTY DISPUTE RESOLUTION SKILLS

Third parties may act as consultants, helping one side or both sides analyze the dispute and plan an effective response. Alternatively, they may act as facilitators, arranging the forum, setting agendas, and guiding productive discussions. More active roles for third parties may be either mediation or arbitration.

There are many cases when the board should rely on third-party experts to help resolve corporate governance disputes. These include when:

- Disputes can no longer be managed within the boardroom

- Tensions rise with dissident shareholders

- Local advocacy groups threaten the company's strategic development

- Former senior executives sue the directors

"When impartial third parties intervene in a conflict situation, new relational structures and possibilities for moderating the conflict are created," writes Paul Wehr, a professor at the Conflict Research Consortium, of the University of Colorado. "Introduction of a mediator, for example, changes both the physical and social structure of a conflict. New groups and sets of transactions appear with the third party. The presence of an observer tends to put contenders on better if not their best behavior. More accurate communication is facilitated by intermediaries. The issues, interests, and needs of the contenders become clearer with the help of such third parties. There may even be someone besides one's adversary to blame, as intermediaries sometimes divert blame toward themselves as a technique for transforming stalemate into resolution. Most importantly, third parties bring additional minds and skills for problem-solving to the conflict. The contenders are no longer on their own."[14]

Seeking third-party help can be especially effective in preventing disputes and managing difficult corporate changes, such as mergers and acquisitions, which are a

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EXAMPLE

Lawsuits Increase Cost of Mergers and Acquisitions
United States: Securities Class Action Services

"The mergers-and-acquisitions market is heating up again," the *Wall Street Journal* reports in January 2011, "but a new raft of lawsuits claiming shareholders are being shortchanged threatens to complicate and increase the cost of the transactions." Studies show that investors are filing an ever-increasing number of lawsuits against corporations embarking on deals. According to Maryland-based Securities Class Action Services, the number of lawsuits filed in state and federal courts has increased from 36 in 2008 to 191 in 2009 to 216 in the first 10 months of 2010. The *Journal* notes that these so-called "strike" suits "rarely, if ever, scuttle deals. They occasionally lead to benefits for shareholders." Legal analysts say they have increased in recent years partly because the practice has proven to be lucrative for plaintiffs' lawyers who are able to zero in on which companies are eager to be rid of litigation and settle quickly.

COMMENT
Investors are holding boards more accountable for their actions through class action lawsuits. Lucrative compensation for plaintiffs' attorneys also explains the surge in these cases. Boards must become more skilled at resolving these disputes outside the courtrooms. The tensions these cases create for directors also underscores the need for boards to have effective dispute resolution procedures.

SOURCE: Searcey Jones, "First, the Merger; Then the Lawsuit." Wall Street Journal, January 10, 2011. Available at: http://www..wsj.com.

fertile terrain for disputes. Studies show that the number of shareholder-led lawsuits is on the rise, increasing merger and acquisition costs and causing deals to start on the wrong foot.

The ability to draw on a third party when necessary demonstrates the board's maturity and understanding of the dynamics of disputes. Various institutions, firms, and consultants can offer dispute resolution services. A third party can help facilitate strategic discussions, advise on ADR processes, or find effective solutions through mediation and arbitration.

TO REVIEW CORPORATE GOVERNANCE DISPUTE RESOLUTION SERVICE PROVIDERS, SEE VOLUME 2 MODULE 3.

When selecting third-party expertise to help manage corporate governance disputes, boards need to review individual experts based on their needs and a set of commonly agreed criteria including:

- Dispute resolution processes and styles

- Ethics, credibility, and trustworthiness

- Dispute resolution expertise and skills

- Corporate governance knowledge and exposure to directors and senior executives

Mediation qualifications, experience, and background — while some jurisdictions prescribe no generalized qualifications for mediators, in some specific contexts mediators require qualifications prescribed by legislation.

FOCUS

Selecting Mediators: Process Versus Content

Two kinds of mediator's expertise were compared, which might affect disputants' judgment of mediators and their recommendations — process expertise and content expertise:

The mediator's particular content expertise about the details of the dispute appeared to be irrelevant if the mediator was considered to be an expert in the process of conflict resolution. When mediators were seen as process experts, disputants viewed them as more credible and were more favorably disposed toward engaging their services. These judgments extended to the mediators' recommendations. Those recommendations offered by process expert mediators were viewed as higher quality and were judged more favorably.

When the mediator was perceived as lacking process expertise, disputants' perceptions of how well the mediator understood the particular details of the dispute increased their evaluations of the mediator and the mediator's recommendation.

J. A. ARNOLD
PROFESSOR CALIFORNIA STATE UNIVERSITY

SOURCE: J. A. Arnold, "Influence of Third Party Expertise on Disputants' Reactions to Mediation." Psychological Reports, October 2007, 101(2):407-18.

PRACTICE

Selecting a Mediator

When selecting a mediator to help manage corporate governance disputes, boards need to review the following:

- Mediation style or model offered, and whether it suits the case

- Professional affiliation, certification, and its value

- Training and education

- Professional background

- Experience practicing mediation

- Experience in the substantive area of dispute

- Conflict of interest

- Willingness to allow, and possibly encourage, mediation participants to seek creative solutions

- Availability and fees

Evaluating Mediation Skills

MANAGE THE START-UP	
Excellent	Evidence of pre-planning was strong. First remarks (or formal opening statement were thorough, clear, concise, and set a tone encouraging collaboration.
Adequate	Some evidence of forethought and preparation. Opening remarks were adequate but could have been more thorough, clear, or concise.
Deficient	Mediator did not appear to have prepared in advance for the encounter. No opening statement or the explanations were cursory or inaccurate.

GATHER AND COMPREHEND FACTS	
Excellent	Asked neutral, open-ended questions. Summarized and paraphrased parties' statements. Succeeded in generating information about the most sensitive issues.
Adequate	Asked the obvious questions. Generally appeared to discover the facts, though not with great depth or precision. Understood obvious aspects of the facts and reasons with both sides.
Deficient	Asked few, mostly irrelevant, or overly directive questions. Appeared at a loss as to what to ask in follow-up questions. Disorganized or haphazard questioning, filled with gaps and untimely changes in direction. Was easily overwhelmed with new, complex information or confused by data. Missed important aspects of facts or reasons of one side or the other.

UNDERSTAND UNDERLYING POSITIONS AND INTERESTS	
Excellent	Encouraged disputants to focus on concerns and interests. Demonstrated an in-depth understanding of the scope, intensity, and contentiousness of the situation, and of the problems and interests not explicitly stated by parties. Clarified and reframed the issues and assisted parties in identifying priorities.
Adequate	Listened to disputants describe concerns and interests. Understood obvious aspects of the underlying reasons or interests of both sides. Some success at clarifying and reframing the issues.
Deficient	Avoided discussion of underlying concerns and interests. Missed important aspects of reasons or interests of one side or the other.

EXPRESS EMPATHY VERBALLY	
Excellent	Conveyed interest and respect to the parties. Questions were neutral and open-ended; listened respectfully. Helped parties improve their understanding of each other's concerns. Conveyed conspicuous sensitivity to cultural and other misunderstandings and addressed them effectively.
Adequate	Listened to others and did not antagonize them. Conveyed some appreciation of parties' priorities. Conveyed some sensitivity to cultural and other misunderstandings.
Deficient	Came into the discussion abruptly to challenge others. Dismissed others' warnings. Saw others' problems as of their own making and did not want to be bothered. Displayed insensitivity to cultural and other misunderstandings.

EXPRESS EMPATHY NONVERBALLY	
Excellent	Manner conveyed interest and respect to the parties. Non-verbal communication (gestures, body language, voice/tone, eye contact) was appropriate throughout. Manner conveyed conspicuous sensitivity to cultural misunderstandings and addressed them effectively.
Adequate	Manner conveyed some appreciation of parties' priorities. Non-verbal communication (gestures, body language, voice/tone, eye contact) was generally appropriate, but not consistent. Manner conveyed some sensitivity to cultural misunderstandings.
Deficient	Appeared to see others' problems as of their own making and did not want to be bothered. Non-verbal communication (gestures, body language, voice/tone, eye contact) was inappropriate. Manner displayed insensitivity to cultural misunderstandings.

CONVEY IMPARTIALITY	
Excellent	Manner of introductions and initial explanations showed equal respect for all disputants. Listened to both sides. Asked objective questions, conveyed neutral atmosphere. Demonstrated that he or she was keeping an open mind. Verbal and non-verbal communication did not favor either party.
Adequate	Generally showed respect for all disputants but questions and non-verbal communication sometimes showed he or she was more comfortable with one party than the other. Maintained a balance, but showed a better understanding of one party's goals and beliefs than the others.
Deficient	Asked misleading, loaded, or unfair questions exhibiting bias. Engaged in oppressive questioning to the disadvantage of one of the parties.

MANAGE THE PERSONALITIES	
Excellent	Had effective techniques for redirecting parties' focus away from sullen or otherwise unproductive colloquies. If humor was used, the use was appropriate to both the situation and parties' cultural and other perceptions. Managed all client/representative relationships effectively. Used effective techniques to deal with manipulative, domineering, and/or destructive behavior.
Adequate	Generally recognized signs that discussion had turned sour and took action to try to redirect it. Not always effective at lightening the atmosphere. Did not allow bullying by clients or representatives.
Deficient	Made little or no effort to provide perspective on the parties' problems or to engineer lighter moments. Allowed clients or representatives to control process in ways counterproductive to resolution. Use of humor was culturally or otherwise inappropriate.

ASSIST PARTIES IN GENERATING OPTIONS	
Excellent	Assisted the parties in developing their own options and evaluating alternative solutions for themselves. Demonstrated commitment to allowing full play to parties' own values. Vigorously pursued avenues of collaboration between the parties.
Adequate	Made some attempt to get parties to think about their dispute on a deeper level. Showed parties how some of their proposals and compromises interrelated with ideas of other parties. Allowed collaborative problem solving, but did not stimulate it.
Deficient	Made little effort to let parties have control over their fate. Ideas on collaboration-building were ineffective and unworkable. Blocked efforts at seeking collaborative solutions.

Evaluating Mediation Skills *(continued)*

GENERATE OPTIONS	
Excellent	If and when the mediator generated options directly, those options responsive to parties' concerns, timely, and put forth only after making strong efforts to focus on and stimulate the parties' collaborative problem-solving. An option was never presented with such force that parties would be likely to interpret it as the only one.
Adequate	If options were generated directly by the mediator, this was only after allowing for collaborative problem-solving, and options put forth were responsive to parties' most obvious concerns. Showed parties how some proposals and compromises interrelated with ideas of other party.
Deficient	Tried to come up with solutions individually, without letting parties have control over their fate. Ideas on substance were ineffective and unworkable. Prematurely tried to come up with solutions, pushing parties toward compromises prior to establishing essential facts.

ASSIST PARTIES IN GENERATING AGREEMENTS	
Excellent	Emphasized areas of agreement. Clarified and framed points of agreement. Assisted parties in evaluating alternative solutions. Showed tenacity throughout mediation. Packaged and linked issues to illustrate mutual gains from agreements. Clearly conveyed limitations to possible agreement and consequences of non-agreement for each party.
Adequate	Choices of what to present and manner of presentation did not compromise goals of resolution. May not have effectively helped parties get at some tough issues, thus sidestepping putting self and others in difficult situations at the cost of missing possible opportunities for joint gains.
Deficient	Failed to allow full opportunity for parties to find their own solutions prior to indicating any evaluation of the case. Presentations not well related to goals of resolution. Was difficult to understand or unclear in expression. Appeared flustered and uncomfortable most of the time; little or no confidence expressed.

GENERATE AGREEMENTS	
Excellent	Asked questions to highlight unacceptable and unworkable positions. Consistent use of reality testing. Effectively helped parties to move past apparent impasses. If substantive suggestions by the mediator were necessary, the suggestions demonstrated.
Adequate	Choice of when to press for action did not compromise primary goal of party self-determination. Generally demonstrated understanding of information the parties offered. Avoided advising parties on some tough issues even when no reasonable hope remained that the parties could achieve results without this help. Had significant difficulty moving the parties past apparent impasses.
Deficient	Did not initiate suggestions even when no grounds remained for believing that (within a reasonable time in the context of the case) parties could yet make mutually acceptable suggestions without direct intervention. Suggestions were premature or questionable (factually or legally). Readily withdrew when challenged or questioned. Little or no confidence expressed.

MOVE THE PARTIES TOWARD AN IMPROVED RELATIONSHIP	
Excellent	Encouraged and facilitated constructive interactions directly between the parties. Established atmosphere in which anger and tension were expressed constructively. Emphasized areas of improved mutual understanding. Progress of discussion demonstrated that mediator had helped improve the way the parties viewed each other. Helped the parties to understand the limitations of possible immediate agreements and consequences of a superficial approach for each party.
Adequate	Provided some opportunity for parties to interact constructively. Choices of what to present and manner of presentation did not compromise goals of relationship-building. Avoided asking some significant questions, thus sidestepping putting self and others in difficult situations at the cost of missing possible opportunities for improved understanding between the parties.
Deficient	Failed to lead parties toward greater mutual understanding. Did not initiate help; was inert rather than actively listening. Presentations not well-related to goals of relationship-building. Little or no confidence in the parties' ability to interact constructively, or to improve their future relationship, expressed.
MANAGE THE INTERACTION AND CONCLUSION	
Excellent	Made all decisions about managing the meeting, including caucusing, order of presentation, etc., consistent with rationale for progress toward resolution. Concluding statement accurately conveyed necessary information regarding compliance and follow-up in language appropriate to parties' culture and education.
Adequate	Controlled process, but decisions did not reflect a strategy for resolution. Did not dominate, but was not overwhelmed by factual or legal complexities. Concluding statement was adequately expressed and did not contain obvious gaps or inaccuracies.
Deficient	Encouraged discussion of issues or proposals with little relevance to potential agreements. Decisions on procedure and presentation were unjustified. Was confused or overwhelmed by factual or legal complexities.

SOURCE: Adapted from Christopher Honeyman, et al., Performance-Based Assessment: a Methodology, for Use in Selecting, Training and Evaluating Mediators. *Washington DC.: National Institute for Dispute Resolution,1995. Available at: http://www.convenor.com/madison/quality.htm.*

Qualifications usually revolve around knowledge of the theory and practice of conflict, negotiation and mediation, mediations skills, and attitudes appropriate for mediation. There are three factors of relevance: experience in practice of mediation, experience in the substantive area of the dispute, and personal life experiences.

It is not always the case that a dispute resolution expert can personally be identified or agreed upon in advance. This is especially true when mediation procedures are derived from standard dispute resolution clauses embedded in such contracts as shareholder agreements. Typically these clauses stipulate the choice of mediator in advance rather than allow the parties themselves to choose a mediator previously known to them. There is a qualitative difference between clauses that give the appointing body the right to impose the mediator as it may choose and clauses that permit an appointing body to suggest a mediator for the parties to accept or reject. Standard form contracts may choose either approach. In shareholder agreements, the parties' willingness to mediate at all may depend on the confidence invested in the nominating body, specifically whether that body is a professional organization that effectively guarantees that the mediator is a practicing professional operating under that body's ethical standards.

Mediation Processes and Styles

Based on their objectives, needs, and the issues to be resolved, boards can select various ADR processes, which range from simple facilitation of retreats to formal arbitration of cross-border shareholder disputes. To choose the best approach suited to them, directors should be aware of all the processes available to them and third-party experts should provide guidance on selecting the right approach.

> TO REVIEW STANDARD ALTERNATIVE DISPUTE RESOLUTION PROCESSES AND THEIR RESPECTIVE BENEFITS, SEE VOLUME 1 MODULE 3.

Mediation is the most common and most flexible process for resolving corporate governance disputes and does not preclude the use of other processes, such as arbitration or court litigation.

FOCUS

What Does a Mediator Do?

- ► Bring parties together
- ► Establish communication and set an atmosphere for negotiation
- ► Help negotiate agendas and clarify issues to be addressed
- ► Help parties obtain data they need to make decisions
- ► Facilitate joint sessions and call caucuses
- ► Clarify interests, priorities and alternatives to an agreement
- ► Help parties explore ideas for creative solutions
- ► Identify overlapping interests or areas of potential agreement
- ► Help parties agree on criteria to evaluate solutions
- ► Record agreements as they develop
- ► Facilitates communication in the mediation process
- ► Encourages the exchange of information
- ► Helps the parties to understand each other's views
- ► Promotes venting or emotional expression in a safe environment
- ► Shifts the focus from the past to the future
- ► Sometimes, suggests proposed solutions (evaluative style)

As discussed by author Christine Leick[15] there are different mediation styles to choose from:

- *"Facilitative" mediation.* *Webster's Dictionary* defines "facilitation" as "to make easier," and it is certainly the desire of every mediator to make the process easier for the parties. Facilitative mediation may be defined as a forum in which a neutral third party facilitates communications between parties to promote settlement. A mediator may not impose his or her own judgment of the parties' issues. The "facilitative" mediator typically exercises a strong influence over the mediation process, but does not attempt to control the outcome. He or she focuses on priorities and agendas, factual information, discussion of needs and options, and typically produces written reports.

- *"Directive" mediation.* An extremely facilitative mediator may not intervene between the parties much at all. Thus the word "directive" can be used to describe a type of facilitative mediation in which the mediator is more involved in giving legal information (but not advice) and directing the process. A directive mediator may appear less concerned about the parties' relationships and more concerned about making progress toward settlement. The directive mediator focuses the parties on reaching agreement much more quickly than the typical facilitative mediator. Mediators are likely to be more directive when they are mediating under a deadline, such as an upcoming trial date.

- *"Evaluative" Mediation.* *Webster's Dictionary* defines the word "evaluate" as follows: "to determine or fix the value of, to determine the significance or worth of, usually by careful appraisal and study." A mediator should recognize that mediation is based on the principle of self-determination by the parties. It requires that the mediation process rely upon the parties' abilities to reach a voluntary, un-coerced agreement. This approach permits the mediator to evaluate and assess both the facts and the law and then provide not only an evaluation, but also settlement suggestions. The mediator may provide information about the process, raise issues, offer opinions about the case's strengths and weaknesses, draft proposals, and help parties explore options. The mediator helps find a voluntary resolution of a dispute. Parties should be given the opportunity to consider all proposed options. It is acceptable for the mediator to suggest options in response to parties' requests, but not to coerce the parties to accept any particular option. The parties have the primary responsibility for the resolution of a dispute and the shaping of a settlement agreement. A mediator shall not require a party to stay in mediation against the party's will.

The purely "evaluative" mediator typically responds to the case's facts and the parties' discussions and/or arguments by suggesting how he or she believes that one or more matters could be resolved.

- *"Transformative" Mediation.* *Webster's Dictionary* defines "transformative" as "to change in character or condition." Transformative mediation typically involves the least amount of intervention by the mediator. In fact, practitioners of this approach, created by Baruch Bush and Joe Folger, would not describe transformative mediation as a style. Rather, they refer to it as a framework. If the above styles are laid out on a continuum from the least amount of intervention to the most intervention, the transformative style would precede the facilitative style. Whereas other forms of mediation are based upon traditional conflict theories, such as competing rights or meeting needs with limited resources, transformative mediation is grounded in relational theory that views conflict as a crisis in human interaction. The goal of the purely "transformative" mediator is to help people change the quality of their conflict interaction. He or she listens to the parties' conversations, looking for opportunities to empower each party to move from weakness to strength. In addition, he or she focuses on the movement from full self-absorption toward responsiveness to the others' needs. The parties control the process and the outcome. Thus, the transformative mediator is much less active than the "facilitative" or "evaluative" mediator.

While the control over process and outcome, afforded to the parties by a purely facilitative mediator, may be very attractive to certain clients, others may feel that they

are not receiving enough assistance from their mediator. Facilitative mediation will not meet all the parties' needs unless it also includes transformative and evaluative techniques.

Transformative mediation may be the most spiritual form of mediation, and the truest generator of client self-determination. But facilitative skills are needed to keep the parties on track, organize information, and memorialize agreements.

Evaluation and suggestion can often lead to settlement. However, these techniques should be used only if all else fails. If they are used early in the process, or to the exclusion of other techniques, the parties are deprived of the opportunity to discuss their needs, explore settlement options, and reach agreement without the mediator's judgment. In addition, if an evaluative style must be adopted, it will be more effective after the parties have become comfortable with the mediator and are confident in the mediator's impartiality. It is best used when the parties' lawyers are present, since they can assist their clients in "evaluating" the mediator's analysis, effectively responding to the mediator's recommendations, and achieving final agreement. An evaluative mediation session is more like a settlement conference (with the neutral third party acting as a private "judge") than it is like true facilitative mediation.

A generation of ADR professionals has been trained largely in an approach that emphasizes problem-solving and self-determination. Often referred to by mediation teachers among themselves as the "American model," this approach may be potentially inappropriate, for example, in a collectivist culture.

In thinking about the skills and qualities of directors and a dispute resolution professional, the disputants' cultures within the wider corporate environment should be considered. In some cultures, disputants expect a third party to serve as a source of wisdom and be assertive in directing them toward a solution. This expectation may be derived from a combination of age, social, or professional status, or such other factors as the level of responsibility within a religion. If a third party is not acceptable to the board or other parties involved, an alternative would be to identify a mediator who demonstrates appropriate intercultural expertise or has received special training in intercultural disputes. Such training is now offered by an increasing variety of institutions.

If such an evaluative mediator is not acceptable to all parties involved, an alternative is to insist on a mediator who can demonstrate that he or she has received and absorbed special training in intercultural disputes. In this case, the qualities of the ADR professional and the ADR process in relation to a national culture should be considered, as well as the professional, ethnic, industrial, and other cultures in which the dispute arises. There is an

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QUOTE

Approaches to Mediation

"There is no one single approach that is appropriate or effective for a mediator to use all of the time in every case. Many conflicts require various different interventions over the course of the mediation of a dispute. Effective mediators must use different styles of intervention based on the needs of the parties, as disputants often need more than process assistance from a mediator. They frequently need understanding, engagement, creativity, strength, wisdom, strategic thinking, confrontation, patience, encouragement, humor, courage and a host of other qualities that are not simply about process, including advice about substance.

"Our approach depends on the case and the format requested by the parties, but generally we are merits-based mediators. When requested, and where the parties and the process would be best served, we will assist on a more evaluative level. We believe that persistence, a not-too-large ego, and good humor are all good characteristics of a facilitator/mediator of complex, multi-interest disputes. In complex cases such as we generally mediate, parties expect the mediator to be familiar with the issues under discussion and for the mediator to be actively engaged in negotiations."

PRESS, POTER & DOZIER, LLC

SOURCE: http://www.presspotterlaw.com/Analytical-Mediation.shtml.

increasing need for mediators to be culturally adaptable, since the "culture of the corporate boardroom" may be sharply different from the professional, indigenous, local, regional, or national culture of one or more parties with whom the board finds itself in a dispute. Corporate governance issues can include issues in which key stakeholders in the company's future share few cultural assumptions with the company's management; any mediator who hopes to be helpful in that situation must be sensitive to both cultures.

In corporate governance cases, the type of mediation to be sought will depend on the:

- Board and the parties' conflict management style

- Issues involved

- Cultural setting

- Personalities involved

If the settlement is likely to be something like "party A will pay party B 10-million Euros," evaluative mediation may be required. However, if the settlement is likely to involve continuing relationships which need to move into a new phase, or an apology, a facilitative mediator's style is more likely to help the parties make progress.

If the mediator is expected to serve as an evaluator, both corporate professional gravitas and substantive knowledge can be extremely helpful. The proof of this is the prevalence of former high-level corporate officers and former civil or appellate court judges among the mediator rosters of firms that are known for evaluative mediation. But often, a more facilitative mediation style is warranted, perhaps because the most advantageous settlement of the dispute cannot be essentially expressed in a number. For the reasons described above, a mediator having every desirable quality is no more likely to be found than is a perfect human being. So trade-offs are necessary. When the trade-off in a facilitative mediator for additional substantive knowledge, or for experience serving at a high level in a corporation, is some compromise on the level of empathy, investigative skill, or one of the other qualities described above, the company is likely to find it ultimately to be a bad bargain.

"Transformative" mediators are less frequently used in a high-level corporate setting, at least under that name. Paradoxically, however, a mediator with transformative skills can be extraordinarily helpful as the "internal board conflict specialist" because this, among all kinds of mediators, is most appropriate to helping others develop constructive long-term relationships that are critically important within the board itself. This suggests that, as

PRACTICE

Inviting an Opening Statement from Each Party: Styles and Approaches

The approach selected by the mediator to invite parties to each make an opening statement can influence the tone and style of the discussions that follow. Options include:

▶ Fact-based approach: "Tell me the history and facts in this case as you see them."

▶ Positional approach: "Tell me what you are here for, what would you like to achieve in the mediation."

▶ Narrative approach: "Tell me what happened and what effect it had on you."

▶ Problem-solving approach: "Tell me what decisions need to be made today."'

▶ Procedural approach: "Tell me first how you thinking we should go about resolving the problems that we are dealing with."

▶ Interest-based approach: "Tell me what your concerns are today."

SOURCE: http://www.mediate.com/articles/bryson.cfm.

these principles become better known, the relatively rare person who has both the self-effacing qualities of a true transformative mediator and extensive corporate board or high-level management experience should be in great demand.

Ethics, Credibility, and Trustworthiness

ADR professionals must be able to command the disputants' trust and confidence. They must be considered by all the parties involved as independent and impartial. A reputation for strong ethics and an empathetic manner helps the ADR professional in creating the right environment to support ADR.

One of the toughest issues to consider is the concept of fairness, the fulcrum on which a successful ADR outcome rests. As Lord Nicholls of Birkenhead opined: "Features which are important when assessing fairness differ in each case. And, sometimes, different minds can reach different conclusions on what fairness requires. Then fairness, like beauty, lies in the eye of the beholder." The disputants' perceptions of fairness are influenced by the way in which the board engages an ADR expert. These perceptions also result from "the impact on clients of mediators' informal decision-making and the informal qualities of treatment they receive are critical factors in establishing whether or not the process is perceived as fair by those participating in mediation. Fairness must be seen in order to qualify as such."[16]

ADR professionals routinely describe themselves as "professional neutrals." The word "neutral" is heavily advertised by the field as one of its practitioners' key characteristics. Yet, neutrality is an approximation. With the best of intentions, ADR professionals, and all humans, are vulnerable to biases, not all of which they are fully aware:

- *Personal biases.* Biases in favor of or against a particular point of view or party are called personal biases. They are the most obvious type. The paradox arises from the fact that virtually all ADR professionals pride themselves on avoiding personal biases.

It is common, however, for a party to perceive a bias, based on a mediator's questions or other actions that the mediator is unaware convey bias. The principal problem with a perceived bias is that parties find it difficult to have an open, straightforward discussion with a mediator whom they suspect is biased; they may "shut down," thus preventing the mediator from correcting what may be a mistaken impression.

If bias is suspected, directors should discuss it with other board directors, and consider raising the concern straightforwardly but respectfully with the mediator. The air can be cleared more easily than seems apparent at first.

> ## QUOTE

Building Trust and Confidence

"Gaining the trust and confidence of the parties is the most important element in mediator success. The mediator's skills are also important, but less often cited as reasons for mediator success than the mediator's confidence-building attributes. Finally, and of considerable importance, there is no single model of the successful mediator. Different mediators succeeded on the basis of different combinations of attributes and skills."

STEPHEN B. GOLDBERG
MEDIATOR AND PROFESSOR OF LAW AT NORTHWESTERN UNIVERSITY

MARGARET L. SHAW
MEDIATOR WITH JAMS AND TEACHER AT NEW YORK UNIVERSITY LAW SCHOOL

SOURCE: Stephen B. Goldberg and Margaret L. Shaw, "The Secrets of Successful (and Unsuccessful) Mediators." Dispute Resolution Alert. *Winter 2008. Available at: http://www.jamsadr.com/files/Uploads/Documents/DRA/DRA-2008-Winter.pdf.*

■ *Situational Bias.* Less obviously, mediators and other ADR professionals are vulnerable to what has been called "situational" bias.[17] Situational biases arise from a mediator's connections to and possible obligations towards persons or parties not directly involved in the dispute. For example, the obligation not to embarrass the corporation may be keenly felt by a mediator appointed by the board, especially if the ADR professional is a "repeat player" with strong links to the CEO or another corporate professional. Parties certainly need to consider these limitations in selecting an ADR professional and discussing confidential matters. ADR professionals should be willing to discuss any potential limitations that they have. A refusal to take such concerns seriously can be considered a warning sign.

EXAMPLE

Avoiding Conflicts of Interest
USA: AAA

"No person shall serve as an evaluator in any dispute in which that person has any financial or personal interest in the result of the early neutral evaluation, except by the written consent of all parties. Prior to accepting an appointment, the prospective evaluator shall disclose any circumstance likely to create a presumption of bias or prevent a prompt meeting with the parties."

SOURCE: AAA, Early Neutral Evaluation. Getting An Expert's Assessment: Practical Guidelines and Steps for Getting Started. *2005. Available at: http://www.aaauonline.org/upload/223188376_Early%20Neutral%20Evaluation.pdf.*

FOCUS

Codes of Conduct

Mediators typically abide by a professional code of conduct that mirrors the underlying principles of mediation. The most common aspects of this code include:

▶ A commitment that requires participants to be informed about the mediation process.

▶ The need to adopt a neutral stance is provided to all parties to the mediation, revealing any potential conflicts of interest.

▶ The requirement for a mediator to conduct the mediation in an impartial manner.

▶ Within the bounds of the legal framework under which the mediation is undertaken, any information gained by the mediators should be treated as confidential.

▶ Mediators should be mindful of the psychological and physical well-being of all the mediations participants.

▶ Mediators should not offer legal advice; rather, they should direct participants to appropriate sources for the provision of any advice they might need.

▶ Mediators should seek to maintain their skills by engaging in ongoing training in the mediation process.

▶ Mediators should practice only in those fields in which they have expertise gained by their own experience or training.

SOURCE: Wikipedia, Mediator Codes of Conduct. *Available at: http://en.wikipedia.org/wiki/Mediation#Choice_of_mediator.*

- *Structural Bias.* Most obscure is a class of biases that has been described as structural.[18] Ideally, both parties can expect to be treated equally. But in practice, if there are sharp differences in power among parties, the more powerful party may find itself constrained (to a degree) by the need to defend its ideas and proposals in the face of a mediator's questioning, thus playing more within the weaker party's frame of reference.

A vulnerable party may distrust the mediator and find the entire process biased against the group's interests. Seeking agreement among contending parties, inevitably, leads the mediator to look for accommodations that are workable for both sides, and such accommodations are more likely to appeal to the moderates than to those on the extremes.

These situational and structural biases must be seen in perspective. Other problems and, in many cases, even worse biases become attached to litigation and other dispute resolution methods. Experienced, sophisticated parties take into account the inherent limitations of all. ADR processes the personal limitations of even the best professional, and then designs strategies to fit the particular situation.

Dispute Resolution Skills and Expertise

Boards must make sure that a mediator under consideration is not completely lacking in any of the requisite skills. Third parties called on to resolve corporate governance disputes need many of the broad professional negotiation and mediation skills, but with different emphases, plus additional capabilities unique to dealing with corporate governance issues. Their training, acquired skills, and expertise must meet the multi-faceted demands of a process requiring "reconciliation of differences, apology, and forgiveness of past harm, and the establishment of a cooperative relationship between groups, replacing the adversarial or competitive relationship that used to exist."[19] Experts should nevertheless be cognizant that the stakes in corporate governance disputes are often higher and involve strong, well-rounded personalities. Resolving corporate governance disputes typically involves smoothing over tensions. These tensions are rooted in three areas: between creating and distributing value,

between empathy and assertiveness, and between the interests of principals and agents.[20]

To succeed in handling the procedural, psychological, substantive, and interpersonal demands of these tensions and the inherent dynamics of dispute resolution, Creighton University Professor Bernard Mayer writes that a third party must have "a way of thinking, a set of values, an array of analytical and interpersonal skills, and a clear focus."[21] Corporate governance adds its own complexities to the process.

Third parties handling dispute resolution must be skillful communicators to establish trust among the disputants,

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FOCUS

Preserving and Augmenting "Face"

A natural question — never far from the mind of a CEO or chairman when faced with a dispute within or involving the board — is how to "save face," and perhaps, too, how to help other board directors do so. One's dignity and reputation, however, may not only need to be saved, but can also be augmented by adroit handling of conflict. In this context, the CEO and/or chairman must conspicuously maintain operating control.

Given the unpredictable environment often surrounding an emerging dispute, the best single action that a CEO can take is to persuade the board to adopt appropriate standing principles in advance, at a time when no immediate dispute threatens to inflame passions and distort judgment.

Making it clear to all concerned that the conflict specialist is acting on the CEO's behalf goes a long way toward ensuring cooperation elsewhere in the organization, while preserving the CEO's right to amend or reject any conclusions or recommendations that the conflict specialist may make. Whether the conflict specialist has direct access to the board is also at the CEO's discretion. Describing the conflict specialist's role as one that is delegated by the CEO also makes clear that the conflict specialist is not there to undermine the CEO's authority, but to execute it.

maintain a position of neutrality, and effectively negotiate a solution, all the while explaining complex issues and the ADR process in ways that all parties understand. "There are two important skills in effective communication: assertive behavior, i.e., clearly expressing what you feel and saying what you want; and active listening, i.e., listening in an understanding, non-judgmental and supportive way."[22] These skills are essential in conducting the "three conversations" typical in the dispute resolution process: "the 'What happened?' Conversation, the Feelings Conversation, and the Identity Conversation."[23]

In the 1990s, the Hewlett Foundation and the National Institute for Dispute Resolution produced *Performance-Based Assessment: A Methodology for Use in Selecting, Training and Evaluating Mediators.*[24] The report proposed general measures of competence for mediators and a methodology for performance-based assessments as predictors of success. The qualities listed below are those the report considered "likely to be needed most to perform the most common and essential tasks of a mediator." Although dated, these qualities are relevant for third parties involved in corporate governance disputes.

- *Investigation.* Effectiveness in identifying and seeking out pertinent information

- *Empathy.* Conspicuous awareness and consideration of others' needs

- *Impartiality.* Effectively maintaining a neutral stance between the parties and avoiding undisclosed conflicts of interest or bias

- *Generating options.* Pursuit of collaborative solutions and generation of ideas and proposals consistent with case facts and workable for opposing parties

- *Generating agreements.* Effectiveness in moving parties toward finality and in "closing" agreement

PRACTICE

Framing the Issues

When trying to frame an issue with accuracy as people see it and without bias, several attempts are made until parties agree with the description. Here are some guidelines for effective framing:

► Always frame using neutral language. Use objective and blame-free language. For example, "We are here discussing the failure of party A to pay their membership" (blaming). "Let us begin our discussions about non-payment of membership dues" (neutral and factual).

► Move participants from positions to interests.

► Defuse hostilities.

► Try to clarify the issue from a neutral, third-party perspective.

► Deal with one issue at a time.

► Get agreement that both parties want to resolve the issue.

► Be short and concise.

► Frame, don't solve.

Once the issue has been framed to both parties' satisfaction in a clear, and neutral manner, resolution becomes much easier. As discussion progresses and both opinions and positions change, it is appropriate to reframe the issue to ensure everyone continues to focus on the same points.

SOURCE: International Federation of University Women. Workshop on Conflict Resolution: Participant Workbook. Geneva, Switzerland: IFUW, 2001. Available at: http://www.ifuw.org/training/pdf/conflict-participant-2001.pdf.

Mediator's Core Skills

Alertness	Mediators need to concentrate on developing the parties' trust and confidence, especially in the initial phase of mediation when introductions are made and they need to hear the parties' statements carefully. He or she needs to be alert to statements during the mediation. The mediator must also respond periodically to parties' concerns; he or she can only achieve this by being alert and listening carefully.
Patience and Tact	Mediation is focused on achieving a win-win solution for disputants. A mediator should be patient and deal tactfully with each party. The mediation proceedings should focus on an outcome acceptable to both parties. Confrontations between the parties should be avoided. Mediation is a process which may take a long time and, therefore, may terminate with an inconclusive ending. Joint and separate sessions may take longer than expected; therefore, mediation should not be rushed to achieve a successful outcome but rather work with parties to help them resolve a dispute. A mediator is expected to entertain parties' concerns equally and should not convey the impression that he or she has any interest beyond their role as the mediator.
Credibility	A mediator should have impeccable professional integrity and good reputation. His or her professional reputation is their most valuable asset. The mediator's credibility will be determined not only by his or her competency in the art of mediation, but also by their neutrality and ability to understand parties' concerns and help them further their ability to maneuver through challenging aspects, such as ethical issues.
Objectivity and Self-Control	He or she should be objective and willing to determine material facts surrounding a dispute, which requires patience and self-discipline.
Adaptability and Demeanor	The mediation process is focused on evolving consensus between parties on how to best resolve a dispute — rather than being adversarial (e.g., litigation) or competitive (e.g., arbitration). A mediator has to adapt his or her demeanor to suit the role. He or she should be understanding, trustworthy, and have a conciliatory approach.
Initiative	The mediator should be able to help parties understand their positions better and prepare them for trade-offs when necessary. Mediators have to provide options or work with parties to present their options to each other. The negotiation part of mediation can only lead parties to amicable settlement if the mediator takes suitable initiatives to help parties bridge their gap.
Subject Matter Expertise	In general, mediators are generalists and do not work full-time as mediators (this is true for mediators in jurisdictions where mediation is not a full-time profession). Having a subject matter expertise can be problematic as mediators may focus on issues that are not relevant to mediation or restrict parties in resolving a dispute. However, his or her understanding of the rights and duties of a company's stakeholders, and the nature of corporate governance related disputes can be helpful in resolving such disputes. Having boardroom experience is an additional qualification that can help him or her better understand board dynamics in resolving disputes involving board members and senior managers.

SOURCE: IFC Advisory Services. Pakistan ADR and Corporate Governance Projects. 2010

■ *Managing the interaction.* Effectiveness in developing strategy, managing the process, and coping with conflicts between clients and representatives

■ *Substantive knowledge.* Adequate competence in the issues and type of dispute to facilitate communication, help parties develop options, and alert parties to relevant legal information

Corporate Governance Knowledge and Exposure

It can be extremely valuable to have significant substantive knowledge as to the underlying problems in a dispute. ADR experts should understand how boards operate and other corporate governance matters so that they can be sensitive to the issues and quickly understand the parties' positions. For example, if the CEO foresees that some board members are likely to resist a strategy or particular tactics (or concessions) which the negotiation

will probably call for, choosing a third-party expert who has high-level management and/or board experience can add reputational weight to discussions.

ADR professionals must understand corporate governance laws, regulations, codes, and rules governing a board's actions and behavior. Disputes on the board must always be resolved in accordance with directors' fiduciary duties. While knowledge of corporate law and the legal system is important, it is not absolutely essential for ADR professionals to be legal experts. They should nevertheless understand the legal aspects of a case as presented by the parties.

Understanding the Board's Role

ADR professionals must understand the processes unique to a board and its directors and how those will influence dispute resolution approaches. They must also understand the laws, regulations, and best practices that shape board decision-making.

Understanding corporate governance requires understanding the concept of "stewardship" of capital assets and the "stewards'" roles, specifically those of board directors and shareholders. At the core is the separation of ownership and control. Directors are fiduciaries, entrusted by the owners of capital to manage the assets in the shareholders' best interests. Shareholders actively influence boards to deliver performance and increase share value.

> ## " QUOTE
>
> **Striving First for Understanding**
>
> *"Before we strive for settlement; before we strive for solutions; before we strive for empowerment, recognition, or transformation; before any of these, we would be well served to strive first for understanding."*
>
> **J. ANDERSON LITTLE**
> SUPERIOR COURT MEDIATOR
>
> *SOURCE: J. Anderson Little,* Making Money Talk: How to Mediate Insured Claims and Other Monetary Disputes. *New York: American Bar Association, 2007.*

This arrangement creates its own tensions and conflicts. Add to that the inevitable problems that arise between the management (running the business) and governance (ensuring that the business is well run) functions, and a complex array of aligned and competing interests and agendas emerges, ones with crosscurrents that fluctuate relentlessly given economic, social, and political dynamics. Under stress, directors may behave very differently than when their company is performing well and shareholders are highly supportive. The challenge for corporate governance is "to channel the self-interest of managers, directors, and the advisers upon whom [the board] relies into alignment with the corporate, shareholder, and public interest."[25] Hence, governance is conducted as a social process of group interchange and influence.

> TO REVIEW SITUATIONS LEADING TO INTERNAL OR EXTERNAL CORPORATE GOVERNANCE DISPUTES, SEE VOLUME 1 MODULE 1.

Addressing and defusing these tensions demands patterns of interaction and decision-making among directors and between the board and both management and stakeholders. ADR professionals engaged to resolve a corporate governance dispute must ascertain these patterns and include them in their approaches to forge resolutions. These disputes could be red flags signaling deeper problems, including the extent to which the board is dysfunctional. Attempts to impose new ways of discussion, debate, and interaction may obstruct dispute resolution given the power of inertia ("old habits die hard") in how the board operates collectively and its directors individually.

Corporate governance best practice stresses that board decision-making be consensual, with all the directors feeling that each can participate equally in discussions and decisions (strategic, tactical, and operational). Decisions emerge from a convergence of different perspectives informed by each director's specialized skills, expertise, insights, attitude, and experience.

James Surowiecki, author of *The Wisdom of Crowds,* outlines the conditions necessary for establishing a "wise" group. These conditions include: diverse opinion, independent opinion, the ability of group members to

develop and use task-specific individual knowledge in contributing to decision making, and the ability of the group to aggregate individual knowledge and judgment into a group decision.[26] These criteria should be among those that the ADR professionals assesses in examining the strengths and weaknesses of board deliberations to determine which ADR approaches are most promising. A SWOT analysis is one tool for structuring this assessment.

ADR professionals' efforts must ensure that all directors feel engaged and have ownership of the dispute(s) and its

(their) successful resolution. Equally, they need to project confidence, mastery of knowledge, and authority to be perceived as an "equal" with the directors, command attention and respect, and engender trust and confidence in their ideas and actions.

As with any group, boards can be dominated by the chairman and/or other directors who are loathe to dissent or independent thinking. A director may argue solely for the goal of having the board agree with their decision, breeding acquiesce and disinterest from other directors ("social loafing"). The director's topics and his/

her language may be disrespectful and personal. Some directors may be disinterested and rubber-stamp the chairman's requests. Deliberations may be mechanistic rituals deeply engrained in a groupthink process. Relationships outside the boardroom may compromise the way directors look at issues, throwing support behind one view in hopes that this will lead to or expand business ties. Numerous studies of human traits suggest that individuals have a tendency to overestimate their talents, be excessively optimistic by discounting risks, and be biased in how they process information, tending to find more merit in data that supports their viewpoint. These are all considerations for the ADR professional in their analysis to determine how they extract the facts of a dispute and work with the disputants to reach agreement.

Core Concepts of Corporate Governance

ADR professionals need to master the core concepts of corporate governance and have a basis through observance of boardrooms for how they work with directors in handling disputes.

The foundation of trust among shareowners, directors, and managers consists of four corporate governance pillars:

- *Transparency.* Directors should clarify to shareowners and other key stakeholders why every material decision has been made.

- *Accountability.* Directors should be held accountable for their decisions and actions to shareowners, and, in certain cases, key stakeholders, submitting themselves to rigorous scrutiny.

- *Fairness.* All shareowners should receive equal, just, and unbiased consideration by the directors and management.

- *Responsibility.* Directors should carry out their duties with honestly, probity, and integrity.

These pillars provide the foundation for the *Principles of Corporate Governance* developed by the Organization of Economic Co-operation and Development. ADR professionals should be well-versed in the OECD's *Principles.*

Laws, regulations, codes, and best practices determine how corporate governance may be conducted by a board. An ADR professional should familiarize themselves with the board's specific corporate governance process, reviewing such relevant documents as the articles of association (the company's constitution), the board charter, the code of ethics, and policies and procedures. Particularly relevant is the section in any of these documents that speaks to corporate governance dispute resolution. Increasingly, stock exchanges, institutional investors, and others are requiring boards to have ADR provisions.

Finding experts with the appropriate set of skills and experience to handle the complexity of corporate governance issues and disputes may nevertheless prove difficult in some markets. Corporate governance consultants or experts may lack the appropriate dispute resolution skills while dispute resolution experts or mediators may have little understanding of corporate governance matters and exposure to directors and senior executives.

To be better prepared to mediate corporate governance cases, dispute resolution experts should seek training to strengthen their skills and understanding of corporate governance issues. This includes:

- Understanding the corporate governance framework and best practices

- Understanding the board's role

- Being familiar with corporate governance disputes

- Having experience dealing with directors and senior executives

- Dealing with the pressure of high profile cases

> TO REVIEW A SAMPLE CORPORATE GOVERNANCE DISPUTE RESOLUTION TRAINING FOR DISPUTE RESOLUTION EXPERTS, SEE VOLUME 3 MODULE 3.

No dispute resolution professional is perfect. A sense of realism is essential: corporate governance dispute resolution is very difficult work, and no two ADR professionals have exactly the same combination of skills.

In some cases the best solution could be to hire a team of experts to cover all the skills and attributes required for the resolution of complex multi-layered and sometimes publicized disputes, or with dealing with cross-border disputes involving more than two parties. ■

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