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# Guided Choice Arbitration

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## Guided Choice Arbitration

*Paul M. Lurie\**

PAUL LURIE: I know that you have the jargon before you that Stan introduced. Let's get practical here. Most of you are law students. The hardest thing for a young lawyer is to become valuable with your employer, whether it be a law firm or a corporation.

So what I hope to do here today is to give you something to make you valuable. That is, to give you a set of tools, things to talk about with your bosses about how to resolve disputes. And it may be something they haven't heard about, but they should. The concepts are not new, but the reorganization of them into guided choice is something new.

So the first premise to this discussion about guided choice—and by the way, what guided choice is all about is the use of mediation, non-binding mediation to resolve disputes, but to use customized arbitration, customized underscored arbitrations to help the mediation process to resolve disputes.

We're talking about commercial disputes. Most commercial disputes are resolved prior to court judgment or arbitration award. The number, you know, if you're in the court system, the numbers are 95%–98% resolved before award or judgment. Arbitration's a little less, but it's close to 70% get settled.

So the question really is—Why does it cost so much money to resolve these disputes when they're eventually going to get settled anyway? It is a fundamental question facing the law profession, whether it be in-house counsel or clients.

Clients have become extremely dissatisfied with the cost of resolving disputes. Lawyers that know how to resolve disputes quickly, inexpensively, and to preserve business relationships are the future of the profession. Just being a great trial lawyer and winning cases often results in Pyrrhic victories as far as the client is concerned because it

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took too much time, was too expensive, and the results ruined important relationships.

So guided choice and the interchange between mediation and arbitration is a way to create dispute resolution systems that resolve things a lot quicker, a lot less expensively, and hopefully preserve relationships. Hopefully, by the end of my short session here today, you will learn about tools by which you can become valuable and be perceived as being valuable to your employers and hopefully to advance your career. So listen carefully about these concepts.

First of all, What happens when the client comes into the lawyer's office and has a problem? "Somebody owes me a lot of money." "Someone is claiming that I owe them a lot of money." These situations, from a settlement point of view, are called zero-sum situations resolved by zero-sum games. You're dealing with numbers. Who pays what? We're not dealing with a lot of social issues, complex social things, and that's why I'm focusing my remarks on commercial disputes.

So the client comes in, usually with a dispute about money. And then what does the lawyer do? What tools does the lawyer traditionally have? First he says to the client, "We're going to file a lawsuit. This is really ridiculous. Their position is ridiculous. I've listened to you for all of a half hour and I know the facts now, and I can tell you that you can't lose this case and we're going to go ahead and file a lawsuit." That's number one.

Next, the lawyer says, "Let me see your contract. Is there an arbitration clause in the pre-dispute contract? If there is, we're going to do the same thing I just told you about in the lawsuit. We're going to file a demand for arbitration or we're going to respond with a counterclaim in a proceeding that's already been initiated. You can't lose this. It may cost some money, but it will be well worth it. I've actually studied this now for at least forty-five minutes, and I know that I'm right."

Next, the lawyer says, "Let me look at your contract again. Is there a requirement for mediation? If there is, we're going to have to go through the process. Or we may be in a situation, like in most commercial venues these days, where, yeah, let's see, I see that I'm reading the complaint that's been filed against you. You know, this is going to be the chancery division or in the commercial division of the law division, the commercial section of the law division, and those judges send these cases to mediation. So we're going to assume that we're going to start with the mediation process."

Or it may be that there's no likelihood that the judge is going to get involved in this. Maybe I'm going to make the lawyers, you know what, I'm going to call the other side and let's see whether or not we can settle this case either through negotiation or by hiring a neutral ourselves and seeing whether we can get this thing resolved.

Unfortunately, in the vast majority of cases, it's the first position that lawyers will take and say that the position of the client's opponent is outrageous, we're going to win this case, and there's only one place where you win or lose cases and that's in the binding process of either litigation or arbitration.

So unless there's a mediation clause in the contract, usually mediation is not the first thing that lawyers think about. And one reason why they excuse themselves from thinking about it is they say, "Well, you know, mediation is something to be done later. It's not the first thing that we think about."

That is a big defect in the way a lot of lawyers think about dispute resolution. They think that mediation is something that should be done on the courthouse steps. It should be done later after we've spent all the money on discovery, motion practice, et cetera.

The problem is that lawyers think that clients cannot resolve disputes until they have as much information as available under every rock that may be in the path to settlement.

So what happens is that in litigation and in traditional ways of handling arbitration, the lawyer's suggestion that we're just going to go ahead and take depositions and file motions and do all that kind of expensive, time-consuming stuff. And, you know, maybe in a year we'll be ready to try that case in arbitration. Or if we're in Cook County, maybe it's three or four years.

But the point is that in arbitration and notwithstanding the good intentions of the judges, it's very hard to control lawyers spending money. Only the client can really affect that. Most lawyers, under the scenario that how could you possibly decide how to settle this case unless you have complete information, you know, drives a lot of this expense.

And the expense drives the time, and the time drives the ruined relationships and the antagonisms that develop over the history of a dispute. You try to settle a case a year after the dispute has arisen versus a month after it, you have a totally different psychological set in terms of people's anger about each other, and it makes it much more difficult to settle cases.

But that's the system we have, that mediation and settlement is pushed out and is not the first thing that lawyers think about. So in

terms of the kind of tools that you want to use to make yourself valuable in your places of employment, think early mediation. If there's anything that you should take away from the session here this morning, it's early mediation. And what guided choice is all about is how to make early mediation effective.

So now what about this mediation thing? The lawyer says, "Well, you got a mediation clause. We're going to have to mediate." And it appears that the other side is unreasonable, you know, a mediation may be a waste of time. And one thing about mediation is that even though the process may be required, it is essentially voluntary. Because if someone doesn't want to mediate, it's pretty hard to force someone to participate in a negotiation, and mediation really is facilitated negotiation.

So if the lawyer starts out by finding ways not to mediate, there's lots of them. The client may tell the lawyers, "You know what, we've been trying to negotiate this thing. We're just too far apart. The other side is so unreasonable. They don't understand how strong our witnesses are, how strong our experts are. And to sit down and try to negotiate with them next week in mediation is just like what we did last month, and it's really a big waste of time. So I'm really not interested in mediating." And the lawyer says, "Okay, so we'll go through the motions and we really won't use mediation, even though we're going to say we're going to do it."

So why do people behave like this? Why do people not want to settle cases? Why do they start out with this attitude about—it's the attitude which brought them to the lawyer's office. Because most business disputes are resolved without running to a third-party mouthpiece.

The parties, businesspeople resolve disputes. How do these disputes get elevated so that you're really looking for an agent to represent you? Well, we're going to talk a little bit about neuroscience and psychology. And I'd say that this whole area of psychology of dispute resolution is extremely important to all young—it's important to old lawyers, too, but certainly you guys should be getting these tools so that you can be more effective and valuable as negotiator. And remember, mediation is essentially facilitated negotiation.

So let me just talk about a few basic concepts of neuroscience, which has become the buzzword. We used to use the term "psychology." Now we use the word "neuroscience." And I think the reason is that a lot of the principles of psychology, which are so important in negotiation, have been confirmed through the science of neuroscience and particularly using things like functional MRIs to prove that things

go on in the brain that confirm why people behave the way they've been observed for a long time by psychologists.

So we're going to talk about the concept of loss aversion. We're going to talk about the concept of emotion, and we're going to talk about the psychology of the lawyer and how the lawyer interacts with a client on these issues and oftentimes is part of the problem in cases not getting settled. So let's just briefly talk about loss aversion.

People are wired to avoid pain and to seek pleasure. The Nobel laureate, Daniel Kahneman, and his partner, Amos Tversky, published a famous paper in 1979 finding that people are more sensitive to losses rather than to gains.<sup>1</sup> This theory of loss aversion demonstrated that whether there's a gain or loss, that gain or loss can be manipulated or framed—that's an important word in negotiation theory. The way the issue is framed can be to achieve a desired result, meaning to settle cases in the context of mediations.

Now, what neuroscience has done is that whether something is framed as a gain, when it's framed as a gain, it triggers pleasure sites within the brain. And when something is framed as a loss, that is, framed meaning that the party that's negotiating perceives that what is being proposed is a loss, the brain's fear center is not activated. Rather, its pleasure center is suppressed.

So, essentially, expected losses don't create fear. In other words, when a guy says, "I'm supposed to take—you know, I have a demand for \$1 million, you want me to take \$50,000?" That kind of expected loss suppresses the brain's ability to imagine pleasure. And you can really see it as a mediator, and I do a lot of mediations.

A good mediator is a very good observer of what's going on in a mediation room because you see these kind of things. And I'm sure you've seen the same thing when you negotiate with the members of your family, if not yet with your clients.

So this suppression of the pleasure center also affects one's ability to think creatively about meeting the desire for award. So what happens, creativity is an extremely important part of settlement strategy in negotiation theory. Let's look at something a little different. Look at it differently. Well, it's kind of hard to do that if you're angry. You can see that in the newspapers every day talking about whether it be the Israeli-Palestinian situation or any other negotiation that's going on in the newspapers. You see that kind of phenomenon right before your eyes.

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1. Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263 (1979).

So that this suppression of the pleasure center, you know, affects creativity. It affects motivation. You know, people, you see it in negotiation. You know, "I'm sick and tired of hearing this from you. You know, your numbers are too low. Your position is wrong, I'm out of here." And, you know, people do that saying, "What's the matter with him?"

This case is going to eventually get settled three years from now. You're going to spend \$500,000 doing it. Why did he give up? Well, the reason why people give up is they lose their motivation. They lose their motivation because all they see are losses. They don't see any possibility for pleasure, any possibility for gain. It's very important to understand human behavior and why people behave in this manner.

So I mentioned that sometimes lawyers and their surrogates, the expert witnesses, can make matters worse in this regard because what they do is they set expectations. I talked in my earlier remarks about the fact that, you know, you think that you're—you don't know anything or you're entitled to a lot of money.

Well, maybe your lawyers told you that based upon an analysis. And I didn't mean to be flip about a half hour, but sometimes that happens. But let's say that the lawyer has really thought about this, that you, the associate, have read the file and studied the—read the cases and things like that, and that supports the lawyer's position that the client can't lose more than or is certain to gain certain amounts.

And the client has basically turned himself or herself over to the lawyer and says, "Well, if you believe that, I believe that." And the lawyers say, "Well, maybe it's not—you know, there is a factual dispute here. So what caused the building to fall down? You know, let's go out and spend a couple hundred thousand dollars with an expert witness and find out what they have to say about it."

And so the client spends a couple thousand dollars with an expert witness. The expert witness says, "It's not your fault. It's the other guy's fault." Armed with your lawyer's opinion and your expert's opinion, it's pretty easy to be stuck into what's called an anchoring position, and the client goes with that position into a negotiation. The other side says, "Well, I think that maybe we're responsible for this, but we think we owe \$100,000, not \$10 million." Well, that makes the guy that's been prepped by the lawyer and experts get angry. And we're going to talk a moment about what anger does to the negotiation process.

Now, one thing about lawyers, God bless them, you're going to be one of them, that lawyers, especially when they're trial lawyers or involved in analyzing disputes, it's very easy to make predictions. And

the social sciences show that lawyers are often terrible predictors of outcomes. And it's natural.

You've billed a client a lot of money. You've had your associates perform research. You had your experts look at this. And you sort of forget about the fact that when the case goes for binding decision, it's going to be done by a stranger. It's going to an arbitrator. It's going to a judge. It's going to a jury. And those people don't necessarily look at things the way you, the lawyer, look at them.

And there's lots of stuff to read on this about. Lawyers who were in the heat of preparing cases are very bad predictors of eventual outcomes. So I mentioned earlier that when the lawyer in good faith says, "Well, I really can't predict what's going to happen. We really need to get to the bottom of this. We really need to leave no stone unturned."

And what they don't realize is that we think that clients can't make decisions without an enormous amount of information. Well, if you read books like Malcolm Gladwell's *Blink*, which is a pop version of a lot of social science and neuroscience, people often make important decisions on a blink, on a quick basis. They feel that they can come to a decision quickly.

But often the legal process sort of says, wait a minute. This is way too important. You may decide to spend \$1 million buying a company, and you can make that decision on the spur of the moment about whether you feel right about it, but you can't make a decision about whether to resolve this \$100,000 lawsuit?

So there is a disconnect oftentimes between the way businesspeople think and the way lawyers think, and that results in setting unrealistic expectations that the clients then bring into the negotiation, which results in the case not settling early.

And what's so interesting—and I see this so often now as a mediator—that you say to yourself as the mediator, I'm saying, "Why are they so unreasonable? This is such a reasonable proposition which has been put before them." But yet, they just don't want to do it.

Well, the reason is all these social and psychology and neuroscience reasons I've just been talking about, and that is the client isn't thinking reasonably. The clients are thinking about loss aversion, and that is what's driving them. And they lose their ability to think reasonably about what is in their best interest to resolve the dispute.

Now, I mentioned emotions. People settle cases because they want to settle cases. It's an emotional—it's very much of an emotional decision. You know, we see this as mediators. You know, they've been at mediation for two days. They're far apart, and all of a sudden,

something happens, and they come together quickly and resolve the case.

Well, what happened? You know, what happened was that somebody said, "You know what, this makes sense, I feel good about it, and that's why I've changed my position and why we're going to settle this case." So that if you were in a situation where people are angry at each other, it makes it a lot harder to resolve cases. Because when you're angry, that triggers a fight or flight response, and that makes rational choice difficult.

Even the simplest decisions, you know, can be informed by our emotions. For example, in the research, one of the studies is that doctors were treating a patient whose brain tumor prevented the person from experiencing emotions. They found that the patient had difficulty in making even the simplest decisions like whether to use a blue or a black pen despite his intellectual functioning remaining fully intact.

Emotions filter our perception. I don't need to tell everybody in this room. You learn that in kindergarten. But what neuroscience has shown us is that the brain's filter, the amygdala, interprets our emotions to switch our decisionmaking between reptilian, instinctive thinking and cortical thinking, and that makes all the difference in the rationality of people's behavior.

So when you go into negotiations and the other party seems to be very unreasonable given what appears to be the situation, there is an explanation. And if you're going to go into a mediation, you better make sure that the mediation is designed to deal with these preconditions, which are being brought into the mediation.

I remember a case where it was a dispute between a general contractor and a subcontractor, and the subcontractor just appeared—the general contractor had fired the subcontractor claiming defective work, and the subcontractor, of course, was claiming contract balance. And you know, I just sat there thinking, "What is going on here? This seems such an easy case to settle."

Well, I learned that the subcontractor was owned by a third-generation Hispanic family, a third generation in the contracting business. They were very proud people, and they were insulted by the behavior of the general contractor and the termination of the contract. Well, once I saw that, I had a private caucus with the general contractor and I said, "You know what, I think you should apologize to these people. I think it will really help your cause." Anyway, within fifteen minutes of the apology, the case settled.

And every good mediator will tell you stories about that or about the power of apology. But if you don't recognize that's a driver to parties holding on to positions, you're never going to help resolve the case. So what do effective mediators do to help settle disputes, and this is going to morph into how we use arbitration in this process.

First, a good mediator makes people feel that a settlement is good and the right thing to do. And oftentimes, it's not just about the money. I had a case with a very wealthy person that had a claim against a contractor that had built a seawall in Lake Michigan, and there was some repair problems that were very expensive.

And the wealthy person happened to actually be an experienced trial lawyer. And the way the dispute came into the mediation was that it was about the money. There was a gap between the parties over the money and things like that. The claimant was in his eighties, and it was real clear that he needed this like a hole in the head. He didn't need the money. He certainly didn't need to be deposed and go through a trial process and things like that. The way I got that case settled was by getting the claimant to focus on his real interests, and that was he really just wanted to get rid of this thing. For the claimant to stand on principle over money was absolutely the wrong thing to do. Once he realized that getting on with his life was more important than engaging in a drawn-out trial, the case settled.

A good mediator helps the parties understand what is likely to happen in court or arbitration. But the way it's done is very important. You teach the parties. In other words, you say, "Well, what do you think is going to happen? What about this fact? What about this? What about that?" And you get the parties' interpretation. You never tell the party you're going to lose, you're stupid, or words to that effect. All that does is trigger that loss aversion emotion. So a good mediator is a teacher and helps the parties make their own decisions. A good mediator helps the parties identify their true interests. A good mediator acts as a stage director. Sometimes you need to separate the lawyers from the clients. Oftentimes the lawyers may have a much more far-out position than the clients do.

I had a case where the parties were about \$500,000 apart and a case that went on all day. And my office is in Willis Tower, and the lawyers all said, "We don't know how to bridge this dollar gap." It was at 5:00 o'clock. One party was from out of town. So I said, "Well, do you mind if I take him upstairs to the Metropolitan Club?" They said, "Fine." So I took the parties up to the Metropolitan Club, and I told the waiter—I didn't stay, I said, "Don't let them out of your sight, whatever they want." And the only thing I know is that an hour and a

half later, the case settled. There were three men involved, two on one side, one on the other. All I know about what happened was I got the bar bill the next day and it was for six Ketel Ones and two beers. That is why the case settled. What happened was that the change of environment let the parties reframe.

This is the Camp David “walk in the woods.” What do you think goes on when the leaders of our country and other countries are walking through the woods? You know, they don’t have an entourage of people telling them what to do.

So sometimes the clients just need to be released from all this pressure, and sometimes the pressure may come from the lawyer, it may come from their subordinates. Let’s say that the decisionmaker is—the decisionmaker is the president of the company, and this dispute is really in the hands of a vice president. And the vice president feels really strongly that he or she is right and the other side is wrong. And when you sit around the mediation table, you see that as a mediator, the president of the company doesn’t want to ruin his relationship with the vice president by settling the case on the grounds that the vice president doesn’t really like it. Well, what the mediator will do is either meet with the vice president or sometimes take the president out for the walk in the woods. Because it may be in the best interest of the president and the best interest of the company to resolve the case on a different basis.

But if you put everybody in the same room, sometimes it’s very hard to get that kind of result. And it’s especially true, I find, in disputes involving political entities, government entities. It’s very hard to get the representative not to be listening to his or her entourage about how to settle cases. Then sometimes one of the things that you look for as a good mediator is an ability to diagnose what’s the problem. Maybe it’s not a lack of information. Maybe it’s a fear of what’s going to happen if you settle the case. What’s going to happen politically with your organization, corporate or government—and people, there’s a loss aversion.

So they say, “Yeah, I should get rid of this case. Probably the other side is reasonable, but I just can’t make the decision.” Well, the most famous example of that was the Israeli–Palestinian negotiations at the end of Bill Clinton’s term. And Dennis Ross, who was the principal negotiator who still writes extensively on negotiation theory, admitted in a seminar I was at, which I’ll never forget. Everyone was glued to the edge of their seat listening to what happened in these negotiations. Dennis Ross said the U.S. did not pay enough attention to Yasser Arafat’s fears about what the solution was going to mean to him, and

Dennis Ross said, “If I had to do it again, the U.S. would have spent a lot more time on dealing with that fear factor, that loss aversion of Yasser Arafat, and we probably would have had a better chance of getting the Palestinian situation resolved a long time ago.” And we all know what’s happened since then.

So what tools do effective mediators use? The most important one is the ability to do confidential investigations. Confidentiality is the most important thing about mediation. The parties can talk under—and you know, Illinois has the Uniform Mediation Act,<sup>2</sup> and it really codifies a lot of common law anyway. So this ability to really be open and frank with a mediator, not worrying about the mediator going to the other side and saying what you’ve told him. So confidentiality is extremely important, and you learn all sorts of things as a mediator when you investigate.

But some mediators think that mediation is, well, each side submits a brief and we’ll meet next Tuesday. We’ll have a mediation. In complex—in cases involving the kind of factors we’re talking about here today, that will never work. The probability is extremely low. And a lot of untrained former judges acting as mediators use exactly that kind of strategy. They look at the cases as an extension of a settlement negotiation in the courthouse, and those often don’t work when you have the kind of psychological factors that we’re talking about.

So the second element that’s important, besides the ability to investigate, is to have the trust of the parties. Trust meaning that the mediator is fair, is going to treat both sides, all sides—it could be multiple parties—fairly, and is really looking out for the best interests of the parties.

As a mediator in my confidential conversations, the first thing I’ll say, you know, to the parties or the lawyers is, “How can I help you? I’m here to help you.” I say the same thing to all the parties, “I’m here to help you. How can I help you? I’m not here to tell you what to do. I’m not here to evaluate your case and tell you what the jury is going to do.”

That is how I build trust. The evidence is pretty clear that mediators that focus on evaluation immediately sort of like, “Well, let me see, so what was the last offer, you know, what’s the demand,” and sort of start off that way have much poorer track records than the mediators that sort of are trained to do it right.

We talked about the early mediation. You know, some mediators may say, “Well, you know, it’s clear, yeah, you started this a month

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2. 710 ILL. COMP. STAT. ANN. 35/1-13, 16, 99 (West 2013).

after your dispute arose, but it's too early. There's too much information that needs to be exchanged, and, you know, so call me in a year." There's some mediators that actually do that, believe it or not. We'll be talking in a moment about the right way to do it when there's a need for information exchange. Good mediators have the ability to reframe the issues, that acceptance is perceived as good, as pleasurable. That oftentimes requires a reorganization of the facts, another way of looking at the facts, another way of looking at the results, another way of looking at what's in your best interest. And, of course, patience and persistence is a key element.

Mediators that say, "I just don't know what to do anymore, you guys are too far apart, I'm out of here, declare impasse, and go back to the court and go back to your arbitration," that's a terrible trait in a mediator. And also another very important trait is to be optimistic. We know lots of people that the glass is half empty or the glass is half full. A good mediator shows why the glass is half full. They're always looking for ways of looking at the situation and finding an optimistic, win-win type of situation. So that's another key element of a good mediator.

So what's this guided choice thing all about? Well, the essence of guided choice says, "Listen, impasse may occur." Impasse meaning an inability to agree at a particular point in time is not unusual. And the earlier you are in the mediation process, the more likely you're going to have that because people are going to say, "Well, you know, we haven't read the file, we haven't hired an expert, we haven't taken depositions."

But the question really is—What information are you missing? And how can that information be exchanged in a collaborative basis as quickly and as inexpensively as possible? Guided choice has two key elements. One is early acknowledgement that there may be a need to get past an impasse. But what kind of tools do you use to get past the impasse?

Arbitration is one of those tools. Let me explain. The parties have to be convinced—and this is part of the lawyer's attitude going in, and if it's not the attitude going in, it's up to the mediator to tell people right up front. That's the first thing I tell people, "You know what, we may have a session. It's called the mediation."

Mediation really is a terrible word because mediation is a process. It isn't a day. The process is a negotiation process, and it really starts the first day you talk to the mediator. So this idea that the mediation is next Tuesday is really a mischaracterization of the process. It has to be thought of as a continuum.

So what happens is that the good mediator, a guided choice mediator says right up front, “You know what, we’re going to start the negotiations. It’s 9:00 o’clock in the morning. You know, we may run into some roadblocks. There may be a need for more information.” I, as a mediator, try to anticipate as a result of my investigation. I try to anticipate all the information that was necessary. And before I hold this negotiation session, I want to make sure that people are satisfied with the amount of information that’s been exchanged.

I have done mediations where the first thing we do is have a meeting of the experts, remember, under the mediation privilege. This can be done confidentially in terms of not allowing what happens in this meeting to find its way into the arbitration or into the courtroom.

So that I have found in complex construction cases having the experts meet and what’s really—where they are really apart. And in those contexts, oftentimes you’ll find they’re a lot closer than you think or, at the least, the number of issues are a lot smaller than the lawyers think they are. So this need for an information exchange is extremely important, and it should be done before the negotiation. But the negotiation itself may run into an impasse. Maybe it’s the fact that certain depositions haven’t been taken because parties want to save money—Can we get this thing settled? Why should we take a deposition?

If it will help settlement, it’s okay to have these disagreements. The question is—How do you get them resolved? And if you can’t negotiate the resolution like how many depositions, what needs to be done, why not go into arbitration for the purpose only of trying to get a handle on these outcome determinative facts.

Maybe one of the parties resisting settlement says, “I cannot lose my motion for statute of repose” or something like that. Maybe that needs to be explored a little more. Maybe the parties really didn’t get enough information in their collaborative exchange. So it’s okay to engage in arbitration. For a limited purpose, it’s actually even okay to engage in litigation.

I can give you some examples of cases where the courts have worked closely with the mediator, where the court did what it has to do and the mediator did what that person has to do, and the cases get resolved.

What it does is, it says, “We’re not going to terminate the negotiations just because there’s impasse.” And let me tell you that is contrary to the way most people think, lawyers think. They say, “Well, you know, if there’s impasse, we’re out of here, we go back to the litigation, the arbitration, and the next time we’re going to talk about

it is when the judge forces us to settle the case on the courthouse steps.”

By acknowledging the fact that maybe having a customized arbitration instead of going to the courthouse, it may be a good thing having it there as a tool that can be used, and maybe it needs to be used—maybe the case can settle. Maybe the case does need to be tried. But having a customized arbitration in place, which is a lot less expensive and much less time-consuming, will make clients happier about using arbitration. A lot of clients don't like arbitration because they don't know what they're getting themselves into when they agree to it. They're getting into something that just looks like litigation. It's open-ended.

Perhaps they can agree on a customized arbitration that's going to be two days or three days. Perhaps they can agree on a limited number of witnesses. Perhaps they can agree on how much discovery has to be done. Perhaps a limit on e-discovery. All of this can be facilitated by the mediator.

That's what guided choice is really all about. The mediator has the trust of the parties and helps the parties design not only a mediation but also an arbitration, which is there ready to be used when it is needed. It's not the first choice, but sometimes it's necessary.

And issues that need to be customized are things like how many arbitrators, three arbitrators or one arbitrator. The locale, Chicago or London. Discovery, e-discovery, motions, length of hearing, timing, the use of chess clocks. Appeal—Is there going to be an appeal that goes in the arbitration process? Whose rules are being used? What state law applies?

There's a whole bunch of things that can probably be resolved in a few hours by people that are generally collaborative. If they hate each other, that's another story.

And having that arbitration agreement, that customized arbitration agreement in place, has another benefit, and that is that people can see the day of judgment coming. If they don't settle the case, they know that there's going to be an arbitration. They may agree on who the arbitrators are. And just having that avoids these arguments where people say they're not really serious about settling this case.

If everybody says, “If we don't settle this case, in sixty days we're going to get our arbitration award,” that puts an enormous amount of pressure on people to settle cases. So having that customized arbitration designed by a guided choice mediator who's having trouble getting past impasse is likely to help settle these cases, which we know do

settle, but they settle late after a lot of money and a lot of time have been spent.

So I hope that I've given you some ideas that you can use to talk to your bosses about. Show that here's something they haven't thought about that's very valuable, and maybe you're the person that's going to help implement all of this stuff. Bingo, you've become a successful lawyer. Good luck to you.

