**Practical Peacemaking in the Business World**
**Ron Kelly**
**Real Mediators' Real Mediation Models**
**June 16, 2022** (rev. Sept. 24, 2022)

Ron Kelly is a Berkeley, California mediator who handles business and organizational disputes. He specializes in disputes about buildings and land, including construction, real estate, probate cases, and disputes involving governmental entities. He works to promote understanding between parties, not only resolving their disputes but helping parties recognize each other's humanity. He initiated and guided the formation of California's main Evidence Code chapter governing mediation, and played a central role in crafting the Uniform Mediation Act. He's been honored with numerous awards for his work in building the field.

## Context of My Mediations

### My Background, Training, and Experience

Motivated by a belief in peacemaking, I began doing informal, shuttle diplomacy style mediations back in the 1970s. Whether I was talking with family members, college administrators, political activists, builders, or government officials, I repeatedly found myself going back and forth between people in conflict trying to work out something everyone could live with. Something in me also relished my ability to be a trustworthy confidant for disputing parties who could not talk productively with each other.

In the 1980s, I realized there were a number of other mediators in my community – mostly family mediators. I started attending their meetings and trainings. I came to realize how little I knew about conducting joint-session negotiations between angry disputing parties. I had been focusing narrowly on the content of a walk-away settlement – an approach still common in commercial mediations today.

I learned techniques family mediators used to achieve the level of understanding, de-escalation, and even potential reconciliation necessary for parents who would be sharing joint custody of their children after divorce. I found out how much broader the focus of interest-based mediated negotiations could be. I came to understand how much wider the range of possible resolutions became when I could structure face-to-face negotiations that allowed each side to understand there was a different honestly-held point of view on the other side.

Over the years, I've participated in some three hundred trainings and workshops by other mediators from every sector. I've experimented with incorporating elements from many of these trainings in my own commercial mediations. These trainings ranged everywhere from mediator as grief counselor, to graphic recording skills, to international diplomatic processes – and to more standard approaches like those typically used in family, commercial, and labor-management mediations.

Over the past quarter century, I've also provided mediation trainings to thousands of lawyers, judges, business professionals, and court and government staff on four continents. I initiated the regular mediation training offered by University of California-Berkeley's Continuing Education in Law program, and taught this for twenty-five years. Click here for a description of these trainings and sponsoring organizations.

I've provided these same trainings through a number of bar associations. It sometimes comes as a surprise to my students that I didn't come to mediation from a background in law. I came to it out of the business world with many years of experience in construction. Business-related disputes, and especially those over buildings and land, have always been the main focus of my practice.

**Types of Cases and Participants in My Mediations**

I generally mediate business-to-business contract claims and intra-organizational disputes like those between founders and owners of businesses. I specialize in disputes about buildings and land, including construction, real estate, probate cases, and disputes involving governmental entities. In most of my cases, lawyers are front and center. The dispute either already has become a lawsuit or the parties are expecting it to become one. I provide both mediation and arbitration services for these same kinds of cases.

Typical parties and other participants in my mediations are business owners, company presidents and CEOs and their upper management, buyers, sellers, and builders of upscale residential properties, and their attorneys and insurance carriers. Other typical participants might be family members in conflict over inheritance or separation issues.

**Common Patterns of Conflict Before and During My Mediations**

Three main patterns of conflict are pretty consistent among the principals involved, though the drivers of conflict vary depending on whether I'm working with home purchasers, company presidents, governmental officials, family members, or their attorneys and insurance carriers. Direct negotiations between the disputants have broken down and they need a mediator because of three underlying factors.

The first factor is the presence of what some researchers call "blocking emotions." Disputants are angry enough and/or intimidated enough they cannot engage in reasonable and dispassionate exploration of what happened and how their differences can be resolved. Each side nearly always blames the other. An essential missing element I can supply as mediator is to make each disputant feel heard by a neutral third party. I nearly always do this in individual pre-hearing phone caucuses with each side. Until people in the grips of strong emotions feel heard, they're rarely open to hearing what others have to say, including me. They're not open to taking responsibility for what may have been their own part in the situation. They've often lost a sense of their own agency to craft a way out of the conflict.

The second factor is that disputants usually can see their own case quite clearly. They begin to assemble the elements of their story quickly, and tend to block out conflicting information. They build their case to themselves, and are often reinforced by friends and counsel. They convince themselves that any fair judge. jury, or arbitrator will see they're right and they'll win their case – if they're simply determined enough to fight it out. An

important part of what I offer as a mediator is my ability to analyze case documents and evidence independently, and help disputants and their counsel realize there's likely to also be a strong case to be made on the other side.

The third factor is their tendency in conflict situations to experience themselves as being in a contest where there will be a winner and a loser. They see their options as either/or. I believe a good mediator brings the skills of a dealmaker. A dealmaker has the confidence and creativity to look past those opposing interests that seem so clear to the disputants. Ideally, mediators help parties develop potential settlements that take advantage not only of the common interests that are almost always present – like reducing the risks and costs of a full-out court battle – but also of the differing values each party might place on a wide range of potential elements that can be assembled to achieve a creative settlement.

**Common Patterns of Parties' Goals, Interests, and Positions in My Mediations**

Simply put, most of the disputants in my mediations start off wanting me to persuade the other side that they're right and give in quickly so we can all just go home. They expect to try to persuade and/or threaten the other side directly and through me. They perceive their interest as winning the contest.

Before I begin working with disputants, I insist they complete a written questionnaire (please see below). The very first item aims to expand how they see their interests and to give them insights into their relative importance. It reads:

> List your basic interests, and then number their order of importance to you. (For instance: time, money, security, get even, get on with life, minimize risk, fairness, future plans, maintain a working relationship, etc.). To help identify your real interest in each area, ask yourself – "Suppose they agree to what I want – exactly what will that do for me?"

Attorneys frequently aim to be seen by their clients as their zealous advocates and they come in ready to push extreme initial bargaining positions. Clients often appear to want their advocates to start with extreme positions, and expect to hold firmly to them for a long time before making small and increasingly smaller moves towards the other side. They expect to participate in a long day of classic positional bargaining divorced from the merits of their case or potential creative resolutions.

One of the main goals of my pre-hearing questionnaire and my pre-hearing individual caucuses is to prepare parties and counsel to negotiate productively – to head off this often-futile contest. If necessary, I may simply come out near the beginning of our face-to-face session and describe this common pattern of positional bargaining and announce we're not going to waste our time doing that today.

# My Approach to Mediation

## My Core Values and Goals in Mediation

As a mediator since the 1970s, I've had a lifelong belief in the importance of peacemaking and in reducing the damage we do to each other when we fight unnecessarily. In mediation, disputants can gain the experience not only of resolving specific disputed items but also of seeing the humanity of those on the other side of a conflict. As mediators, we have the opportunity to try to change our families, our workplaces, our neighborhoods, and our wider society for the better.

As an example, I was surprised and gratified to receive a letter out of the blue from a CEO who'd been in one of my mediations some five years earlier. He told me that working with me had changed the entire way his large national company conducted its affairs in the numerous lawsuits in which it was named.

A more basic goal in my professional practice is to jointly develop a detailed written settlement that resolves all issues and that all parties and their counsel are willing to sign by the end of a one-day session. The fact that we nearly always do generates repeat referrals from counsel.

## My Routine Mediation Procedures

While I've used a wide variety of different approaches in different cases, the following describes my preferred model developed over the years.

1. Intake. I hold extensive initial direct phone conferences individually with each party's attorney before formal engagement. California law protects the confidentiality of these conversations even if no mediation eventually takes place. I assure counsel that nothing they tell me will be repeated without their express permission. I learn a lot about the case and any particular obstacles, including problems counsel may identify with their own clients. Attorneys learn enough about me to decide to engage me as their mediator and to trust my experience and integrity.

I obtain a written agreement to mediate signed directly by the principals, establishing my direct contractual relationship with them and documenting, for the purpose of establishing confidentiality under California's statutes, that our communications are for the purpose of a mediation. I request they provide me with the key underlying case documents for my review.

I discourage mediation briefs. Although I'll accept briefs if counsel insists, my experience has been that they're largely a rewrite of court briefs explaining why their client is right and the other side's wrong. These cost time and money to produce, and they tend to make clients even further dug in to their positions when they read them.

2. Extensive Pre-Hearing Preparation. Instead of mediation briefs prepared by the attorneys, I insist that the principals themselves write out the answers to a twenty-question questionnaire. It's quite similar to this questionnaire. The one I use in mediation contains

an additional question at the end asking what confidential information they want me to know as their mediator.

Writing the answers to these questions prepares disputants to understand the conflict from an interest-based perspective, explore the emotions underlying the conflict, and get a clear picture of what may happen if they don't achieve a voluntary resolution. This also performs a number of other important functions in preparing parties, counsel, and me for effective negotiations when we meet face-to-face.

As you're reading this, I encourage you take the time to review this questionnaire. It really provides the groundwork for the important ways I prepare disputants and counsel in advance. Better yet, try writing out the answers to this questionnaire for a real dispute of your own and see what effect it has on you.

The parties' lawyers review and edit these questionnaire answers and then transmit them to me. In preparation for individual pre-hearing phone conferences, I spend significant time reviewing these questionnaires, together with any contracts, expert reports, applicable court filings, and other case documents.

I hold separate phone caucuses with each party together with their counsel to go over the answers to the questionnaire, review selected details of case documents, and generally prepare parties and counsel to be most productive in face-to-face negotiations. I greatly prefer the telephone for these discussions. I can be searching through and reading from a variety of documents, and taking extensive notes, without worrying about how much eye contact I may be making with whom.

In these calls, I start by reaffirming with counsel that everything said is inadmissible in any later non-criminal proceeding in which our state law applies. I assure parties what they tell me will remain confidential between us unless they give me express permission to tell the other side. I emphasize they're free to tell me anything they want to enable me to better understand their interests and help them achieve their goals in the mediation. I do my best to make disputants feel heard without agreeing they're right. I provide them an opportunity to vent even their harshest feelings towards those on the other side without contradiction.

I try to identify any additional key evidence, additional parties and/or participants, revised range of settlement authority, and anything else that might be needed for a successful negotiation. We also discuss whether a different structure might be preferable, such as a process where the entire mediation might be conducted caucus-style by telephone and email over a period of weeks.

3. At the Hearing. In my experience, the physical set up of the hearing room is important, including where participants sit relative to each other and to me. In most of my cases, parties are represented by counsel. But whether I'm only working with two self-represented business partners or, more typically, a dozen participants – such as company presidents, their middle-management, carriers' representatives, and counsel – I use this facilitator-style set up. I arrive early and I put myself and a flip chart on one side of a conference table. I place everyone else on the other side facing me.

I usually place the highest conflict individuals right next to each other directly across from me, with their counsel next to them. I arrange any additional claims professionals, expert witnesses, etc. towards the outsides. I do this to reinforce with the physical set-up that we're all collaboratively aiming to develop a single product.

I identify the goal as building together the best possible voluntary agreement – one that satisfies everyone's interests as fully as possible so everyone is most likely to accept it. To help structure the discussion, I prepare a written agenda and place it in front of each participant.

I start with a mediator's opening statement which emphasizes this interest-based collaborative approach. I don't use opening statements by the disputants or their counsel. Instead, I begin by having all participants focus on identifying what are all of the necessary elements of a full settlement. I record these on the flip chart in front of everyone. I politely interrupt anyone who starts to launch into arguments. I reiterate that, at this stage, we're simply identifying what elements need to be resolved, not discussing them yet.

The issues might typically include who pays whom how much by when, the scope of a mutual release of claims, who's responsible for any current debts and for which unforeseen future problems including any potential third-party claims, the procedures for and scope of dismissal of any pending court actions, to what extent, if any, parties are going to continue in some relationship together in the future, and provisions for handling any future disputes about interpretation or compliance with the settlement terms.

An important aspect of this facilitator style is that all participants start out with the experience of facing me and working together on the list, instead of starting off with oppositional presentations by each side. This enables everyone to raise important potentially-triggering points such as "You need to pay me this amount of money!" When participants make statements like these, I politely cut them off and reframe the discussion, saying something like, "Yes, we'll certainly need to come to agreement on who pays who how much money by when. Now, what else will we need to include in a full settlement?" I might quickly record that point on the flip chart with a simple dollar sign and arrows. For people who process information visually, seeing information recorded on a flip chart has an impact that just hearing these same things would not.

When making a list of issues at the outset, I'll frequently say something like, "I don't want us to get to 4 o'clock and everyone think we're close to a resolution, and then have somebody say, 'Oh yeah, there's a big issue we haven't talked about yet.' This can blow everything up again. So I want a full list now. I want everybody to be able to think about all of the potential elements and how they might relate with each other in a full settlement." This is an important list we can refer to at the end of the day when we're all tired. We can review it to be sure we haven't forgotten something important. Counsel often are active in this process.

To reinforce the collaborative nature of the process, I then ask them to develop a joint history. I normally do my best to get the principals to take the lead in this phase. We might discuss how their relationship started, how any contract was formed, what their key communications were, what their important actions were, when problems first started, any attempts to remedy them, etc. This enables everyone to have a more complete picture. It especially enables counsel to hear a wider narrative and set of facts than what they may

have heard from their clients. It provides another opportunity for the parties to identify potentially heated topics while I control the discussion and make a joint visual record in front of everyone. This allows participants to raise touchy points without anyone spinning too far into a disruptive emotional state.

This is a different conflict management approach than the typical commercial case strategy of keeping everyone in separate rooms with the mediator shuttling between them to achieve the lowest common denominator available settlement – often a separation agreement with payment of money. I've found that by keeping everyone together and going through a joint history, disputants who start off angry and estranged often shift their views of each other and past events enough to attempt more honest, collaborative, and direct interest-based negotiation.

I typically insist we jointly develop at least two different frameworks for resolution. One classic framework might be one in which the parties separate immediately with whatever attendant payments and terms might be needed. In a second framework, they might continue working together, or at least unwind their relationship over an extended period of time. I aim to develop at least one framework for resolution before we break for lunch – and preferably more than one.

In contrast to many commercial mediators who bring in lunch and intentionally keep up the pressure of working continuously, I use lunch as a stress break and a chance for each side to discuss things amongst themselves in a more relaxed setting.

When we get back together after lunch, if the parties are able to negotiate directly and productively, we stay in joint session. If not, I may put people in separate rooms and spend much of the afternoon in short alternating caucuses working out details of individual elements of a preferred framework for resolution.

By the time we resume meeting after lunch, I will have provided everyone with a detailed four- or five-page outline of a potential settlement with their names, the issues in dispute, and model language providing options for all of the typical elements of a full settlement. I will have prepared this before the hearing. This will not be a mediator's proposal suggesting how the parties should settle their dispute. Rather, it will provide typical boilerplate language without indicating, for instance, the direction, timing, or amount of any payments.

If I'm shuttling back and forth, then before I leave a caucus room, I try to get parties and counsel working on some element of a resolution while I'm in another room. If nothing else, I ask them to go through the written settlement outline I've prepared. I explain this is an initial draft with neutral sample settlement language disputing parties and their counsel have long found acceptable in similar disputes. I ask them to review it and see which parts of it may be acceptable to them as a neutral starting point for crafting a final written settlement. I make it clear that counsel are completely free to discard this and use their own template but that this has the advantage of not being drafted by either side.

When we reach agreement, I do my best to get all parties and counsel to stay together to jointly work out a full, detailed written settlement, usually several pages long. This differs from typical commercial mediation practice where mediations end with only a "term sheet," and counsel are tasked to work out the details later.

Ever since the first laptops came out, I've brought my laptop and a printer to mediations, and I've continued to act as facilitator and scribe at this stage. Parties have gained the important experience of watching often-aggressive opposing counsel transform into cooperative drafting experts as all attorneys focus on the job of collectively crafting an acceptable settlement. The stated goal is to be able to print out a detailed and comprehensive final settlement that all parties and counsel can sign if they want before we go home.

4. Post-Hearing. In some complex cases, I've needed to conduct follow-up phone conferences and email correspondence to refine settlement details, obtain sign-offs from absent parties, boards of directors, or governmental entities, and/or to ensure preparation of required implementing documents. Normally, these calls and emails are only with counsel.

One such case involved a long list of detailed elements required for the disentanglement of two intertwined business entities. A dozen different complex settlement drafts went back and forth between the attorneys through me until we had a fully acceptable and workable resolution.

**Challenging Situations in My Mediations and How I Handle Them**

In my experience, what's commonly referred to as "impasse" is actually a predictable stage in mediation. I've often found that the last 10% of the process is as hard as the first 90%.

I prepare my own and the participants' attitudes to normalize this stage of mediation and the frustrations that come with it. Typically, each side feels strongly that it has already given way too much and that the other side must make the last move towards them. They're frustrated with the situation, the process, and me. They're often ready to end the mediation and get on with what they picture as winning their case.

Nearly always, I've saved something I've identified in their documents that I think will make them the most uncertain of their chances of winning in court or arbitration. At this stage, I typically push hard on this point in caucus to get them to continue trying to develop a full resolution and back off from ending the mediation.

When we've made as much progress as we can in separate caucuses, I typically get the parties together again and deal with this "impasse" in a reconvened joint session. I've used dozens of different approaches to helping the parties through this last stage. The following are some common ones.

I may shift the expected endpoint of the negotiations either closer or further out. I might say, "You know I've had extensive confidential communications with all sides and I'm confident this can resolve voluntarily. But we're going to need to get back together again tomorrow (or next week)." At the very beginning of each hearing, I will have identified the soonest date that all participants can meet again if we need and want to.

I often identify and save differently-valued elements we have not discussed. I might use these as an exchange – a sweetener – so that each party can gain something it sees as

valuable but which the other side doesn't see as costing them much. That way, we're not just simply "splitting a fixed pie."

I sometimes explore ideas and stories I've casually put out during our discussions about ways other people have closed their final gaps in similar situations.

I may be quite transparent as a dealmaker and normalize the situation. I might discuss typical reasons why people get stuck at this stage. I might ask them to jointly identify and discuss in front of each other the reasons they're stuck.

If they're completely dug in and unable to close that final gap, I sometimes suggest they can easily limit their risk and achieve a settlement within the range of their final positions. They can do this by agreeing to submit the matter to binding last-offer arbitration (commonly known as "baseball arbitration"). In this process, each side submits its last best offer and restricts the arbitrator's authority to picking one or the other offer without modification. I point out this puts pressure on each of them to make the most reasonable last best offer because it's highly unlikely the arbitrator will pick their proposed resolution if it's way out of line.

I frequently offer to become that arbitrator, though they're of course free to choose anyone they want. "Switching hats" from being a mediator to an arbitrator in a case is controversial in the field. It requires solid confidence in the mediator's integrity and the mediator's intellectual ability to disregard anything not properly in evidence before them.

If I become the arbitrator, we agree in writing which statements or other evidence from the mediation, if any, they would authorize me to consider in evidence in the arbitration. Examples might be the pre-existing contract and similar case documents, and all statements heard in joint session by everyone. This has the distinct advantage that they don't have to spend the time and money to bring another neutral up to speed on the case. I make it clear that an as arbitrator, I would not agree to consider anything I heard in caucus, even if they both wanted me to. This is important because parties in arbitration have a right to know all evidence on which arbitrators would base their award. In nearly all my mediations, however, shifting to arbitration is unnecessary because we've reached a full resolution of all significant elements in dispute.

**Evolution of My Approach**

I've used the preceding model for decades with a great deal of success. It evolved over time as I tried techniques from numerous trainings to see if they could address various challenges that arose in my mediations.

When I found that sticking closely to any particular mediation model did not seem to be working, I experimented with mixing various elements typically found in evaluative, facilitative, transformative, community, and/or narrative models.

I generally stopped using separate opening statements by each side, which often generated unmanageable emotions by hostile and potentially violent participants. I switched to using the facilitator-style process described above.

I found that developing only an outline of agreed settlement points often resulted in months of cost and aggravation for the parties when their attorneys did what they believed they were paid to do – namely push advantage for their client in working out the details. So I experimented with providing a mediator's draft outline of a settlement, and staying involved as facilitator and scribe to work out all of the details jointly in front of everyone.

They say that necessity is the mother of invention. The above model evolved over time out of a great deal of experimentation to find techniques that worked in my professional practice. If I can tempt you to explore a radically different approach, consider reading about the model I designed for thirty-minute relationship mediations at my drop-in booth at Burning Man.

I hope the above description may encourage you towards experimentation and creativity in your own approaches to mediation.