

**IT TAKES TWO TO TANGO, AND TO MEDIATE: LEGAL CULTURAL AND OTHER FACTORS INFLUENCING UNITED STATES AND LATIN AMERICAN LAWYERS' RELUCTANCE TO MEDIATE COMMERCIAL DISPUTES**

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**I. INTRODUCTION**

Commercial relationships create substantial economic activity through licensing, distributor, supplier, joint venture, and other transactional arrangements. Changes in economic, market, and other circumstances occur after these relationships begin, however, and often produce differing performance related perceptions and contractual interpretations. These differences may generate disagreements regarding responsibilities, obligations, performances, and entitlements that may escalate into commercial disputes.<sup>1</sup> Because such commercial disputes are increasing,<sup>2</sup> choosing how to confront and resolve them supplies important tasks for lawyers and their commercial clients in the United States and Latin America.

Lawyers and their commercial clients assess a limited menu of dispute resolution options when they make important decisions regarding how to proceed resolving commercial disagreements. Non-violent dispute resolution options include avoiding conflict, seeking consensual agreement with other participants through negotiation or mediation, and adjudicating by using arbitration or litigation to let outsiders decide.<sup>3</sup> Although found in most of the world's cultures and practiced for centuries, mediation is the least used option in this menu.

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<sup>1</sup>See Mark A. Drumbel, *Amalgam in the Americas: A Law School Curriculum for Free Markets and Open Borders*, 35 *San Diego L. Rev.* 1953, 1053 (1998) (flourishing economic cohesion creates tension); Walter G. Gans, *Saving Time and Money in Cross-Border Commercial Disputes*, 52 *Disp. Resol. J.* 50, 52 (negotiations and documents creating commercial relationships are not likely to foresee the multiple possibilities for potential future disagreement and dispute). More than half of joint ventures end within five years, and most terminate within ten. Harold I. Abramson, *Time to Try Mediation of International Commercial Disputes*, 4 *ILSA J. Int'l & Comp. L.* 323, 324 (1998).

<sup>2</sup>Recent political and economic changes have created a rapid increase in the volume of commercial disputes in Latin American countries. Horacio Falcao & Franciso J. Sanchez, *Mediation: An Emerging ADR Mechanism in Latin America*, in *International Arbitration in Latin America* 415, 425 (Nigel Blackaby et al, eds., 2002 (Hereinafter *Mediation in Latin America*)). A survey of 180 in-house lawyers at the largest multinational companies in France, Germany, Italy, the Netherlands, and England showed 38% concluding that the volume of disputes had increased in the last three years. *Survey Reveals Trends in Europe on International Disputes*, 64 *Disp. Resol. J.* 5, 5 (2008).

<sup>3</sup>These three options exist in all cultures. P.H. Gulliver, *Disputes and Negotiations: A Cross-cultural Perspective* 1 (1970); Karl A. Slaikeu, *When Push Comes to Shove: A Practical Guide to Managing Disputes* 16 (1996).

While avoidance may be the most commonly used dispute resolution option around the world,<sup>4</sup> lawyers and their business clients seldom select it for handling significant commercial disputes. Negotiation is used far more frequently, and it is typically conducted by company representatives before involving lawyers or by in-house counsel before hiring outside attorneys. Now widely viewed as identical to conciliation,<sup>5</sup> mediation offers an enhanced negotiation approach to resolving commercial disputes.

Mediation enhances negotiation by allowing lawyers and business persons to converse with the assistance of non-dispute involved mediators who encourage constructive communication and interaction.<sup>6</sup> Mediators help negotiators frame conversations in ways that counter selective and partisan perceptions, exploit shared and independent interests, and investigate resolutions that promote mutual gain.<sup>7</sup> Unlike judges and arbitrators, mediators do not decide issues or enter judgments. Instead, mediators use confidential sessions to generate more and better information that often helps participants create agreements that accomplish more than is allowed by the narrow, win-lose remedies available in adjudication.<sup>8</sup> Combating biased perceptions and distorted judgments, mediators help participants craft resolutions that allow all disputants to satisfy some of their interests.<sup>9</sup> Mediation also allows businesses to control outcomes themselves and avoid the risks, delays and additional costs that adjudicating brings.<sup>10</sup>

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<sup>4</sup> See Christopher W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* 6 (2d ed. 1996). Managers around the world do not like disputes and often flee them by avoiding them and doing nothing. Eileen Carroll & Karl J. Mackie, *International Mediation: The Art of Business Diplomacy* 4-5 (2d ed. 2006) (hereafter *International Mediation*).

<sup>5</sup> The core concept of mediation in most Latin American countries, derived from the U.S., views mediation as third-party assisted negotiation. *Mediation in Latin America*, supra note 2, at 416. Some Latin American countries use different words to describe this process and define it differently, often labeling it conciliation. *Id.* at 416, 420-21. The United Nations Commission on International Trade Law (UNCITRAL) for International Commercial Conciliation defines conciliation as “a process, whether referred to by the expression conciliation, mediation, or an expression of similar import, whereby parties request a third person or persons . . . to assist them in their attempt to reach an amicable settlement of their dispute.” Jernej Sekolec & Michael B. Getty, *The UMA and the UNCITRAL Model Rule: An Emerging Consensus on Mediation and Conciliation*, 2003 *J. Disp. Resol.* 175.

<sup>6</sup> Mediation is best understood as assisted and enhanced negotiation. See, e.g., Dwight Golann & Jay Folberg, *Mediation: The Roles of Advocate and Neutral* 95 (2006); Carrie J. Menkel-Meadow, et al., *Dispute Resolution: Beyond the Adversarial Model* 266 (2005); E. Wendy Trachte-Huber & Stephen K. Huber, *Mediation and Negotiation: Reaching Agreement in Law and Business* 281 (2d ed. 2007). Mediators help solve a primary problem in human communication which is the illusion that it occurs when persons talk. This clarification and translation is important because “people see the world from their own vantage point, and they frequently confuse their perceptions with reality. Routinely, they fail to interpret what you say in the way you intend and do not mean what you understand them to say.” Roger Fisher, et al., *Getting to Yes: Negotiating Agreements Without Giving In* 19 (2d ed. 1991).

<sup>7</sup> Kimberlee K. Kovach, *Mediation: Principles and Practice* 27 (3d ed., 2004); Menkel-Meadow et al., supra note 6, at 266-67.

<sup>8</sup> Menkel-Meadow et al., supra note 6 at 270-71. Common agreements resulting from mediated commercial disputes include future contracts that take account of past wrongs, offer mutual profits, specify or prohibit specific future conduct, and include provisions for valued items such as reference letters and apologies. *Id.*

<sup>9</sup> *Id.* at 270. They can encourage parties to agree to future contract provisions that rectify past problems and offer profit for all as opposed to the conventional money damage remedies adjudication provides. *Id.*

<sup>10</sup> A sample of 606 US Fortune 1000 companies showed that 82.9% thought that mediation allowed disputants to control their own destinies by resolving disputes themselves. David B. Lipsey & Ronald L. Seeber, *The Appropriate*

Despite these and other advantages, adjudication, through either litigation or arbitration, remains the dispute resolution option selected most often in the United States and Latin America after non-mediated negotiation fails to resolve commercial disputes.

Lawyers in both the United States and Latin American countries play important roles in making decisions regarding how their commercial clients approach resolving disputes. Lawyers help clients understand and analyze dispute resolution options, usually an important initial step in making these decisions.<sup>11</sup> Because of mediation's relative newness to the legal dispute arena, lawyers often serve as the primary source of information for their commercial clients about the existence and benefits of this option.<sup>12</sup> Attorneys' explanations and recommendations significantly influence the dispute resolution method used.<sup>13</sup> U.S. lawyers often rely on their adjudication-influenced habitual ways of perceiving and acting while recommending and taking primary responsibility for the means used to pursue their clients' commercial dispute resolution objectives.<sup>14</sup>

Most U.S. lawyers learn about mediation through experience or their legal education.<sup>15</sup> Research demonstrates that lawyers who participate in mediation value mediating more than those who have not experienced it.<sup>16</sup> Experience with mediation is the primary reason U.S. lawyers recommend that their commercial clients use it.<sup>17</sup> In Latin America, personal experiences with mediation or reports by trusted colleagues provide the most convincing reason to use this dispute resolution option.<sup>18</sup>

This article surveys current contexts in which commercial mediation occurs in the United States and Latin American countries. After summarizing data assessing awareness by commercial actors of important differences between commercial mediation and adjudication, it analyzes the relatively infrequent use of mediation despite significant knowledge of its potential advantages. Exploring this discrepancy and focusing on lawyers, it next examines factors that influence U.S. and Latin American lawyers when they converse with commercial clients regarding selecting a dispute resolution. Analyzing similarities arising from universal decision-

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Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations 17 (2008) (hereafter *Appropriate Corporate Dispute Resolution*).

<sup>11</sup> International Mediation, *supra* note 2, at 18.

<sup>12</sup> John Lande, Getting the Faith: Why Business Lawyers and Executives Believe in Mediation, 5 *Harv. Negot. L. Rev.* 137, 169-71 (2000).

<sup>13</sup> Roselle L. Wissler, When Does Familiarity Breed Contempt? A Study of the Role of Different Forms of ADR Education and Experience in Attorneys' ADR Recommendations, 2 *Pepp. Disp. Resol. L.J.* 199, 199 (2002).

<sup>14</sup> Leonard L. Riskin & Nancy A. Welsh, Is That All There Is? "The Problem" in Court-oriented Mediation, 15 *Geo. Mason L. Rev.* 863, 896 (2008).

<sup>15</sup> Lande, *supra* note 12, at 169-71. (Personal experience with mediation supplied the major source of information for about two-thirds of the attorneys and one-third of the executives surveyed).

<sup>16</sup> Richard Rueben, The Lawyer Turns Peacemaker, 82 *A.B.A.J.* 54, 58-59 (1996).

<sup>17</sup> Wissler, *supra* note 13, at 223.

<sup>18</sup> Mediation in Latin America, *supra* note 2, at 429.

making biases and shared legal cultural traditions, and differences flowing from common law and civil legal system influences, this article argues that all strongly influence U.S. and Latin American lawyers toward adjudicating. All also explain why mediation is not used more to resolve commercial disputes.

## II. USES AND ADVANTAGES OF COMMERCIAL MEDIATION

Mediating commercial disputes before adjudication begins may occur voluntarily after disagreements arise or pursuant to contract provisions specifying use of mediation that are negotiated when forming commercial relationships.<sup>19</sup> Contracts specifying mediation first allow a stepped approach where companies agree to explore business-oriented solutions not constrained by legal frameworks initially, and to postpone adjudication until after this effort occurs.<sup>20</sup> Research suggests that agreeing to mediate disputes after they arise seldom happens.<sup>21</sup> Even when one lawyer and commercial client understand the potential gains disputants can achieve by mediating, their counterparts frequently do not share this assessment.<sup>22</sup> Although mediating pursuant to contract agreements made when commercial relationships are established occurs more often, it still happens less frequently than its advantages warrant.<sup>23</sup>

Commercial disputes that generate litigation also are often referred or ordered to mediation under court-connected programs common in the United States and many other countries.<sup>24</sup> Mediating legal disputes already in litigation grew rapidly in the U.S., Australia,

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<sup>19</sup> See Don Peters, *Can We Talk? Overcoming Barriers to Mediating Private Transborder Disputes*, 41 *Vand. J. Transn'l L.* 1251, 1298-1301 (2008) (hereafter *Can We Talk*).

<sup>20</sup> Kathleen M. Scanlon, *Drafter's Deskbook: Dispute Resolution Clauses 1.5* (2002). In many ways this stepped approach parallels the Dispute Settlement Understanding of the World Trade Organization and NAFTA and CAFTA provisions. See Maraja Alejandra Rodriguez Lemmo, *Study of Selected International Dispute Resolution Regimes, with an Analysis of the Decisions of the Court of Justice of the Andean Community*, 19 *Ariz. J. Int'l & Comp. L.* 863, 864-65 (2002). These provisions recommend beginning with consultations following strict guidelines and if negotiations fail, adjudication [via arbitration] occurs. *Id.* Parties can agree to use other processes like mediation at any time. *Id.* U.S. courts generally enforce predispute agreements to mediate by reasoning that these provisions obligate only discussing, not reaching, agreement. Kathleen M. Scanlon & Adam Spiewak, *Enforcement of Contract Clauses Providing for Mediation*, 19 *Alternatives to High Cost Litig.* 1, 1 (2001).

<sup>21</sup> See *Can We Talk*, *supra* note 19, at 1300.

<sup>22</sup> David B. Lipsky & Ronald L. Seeber, *In Search of Control: The Corporate Embrace of ADR*, 1 *U. Pa. J. Lab. & Empl. L.* 133, 145 (1998).

<sup>23</sup> Price Waterhouse Coopers, *Comparative Study of Resolution Procedures in Germany-Summary*, [www.pwc.com/de/dai](http://www.pwc.com/de/dai) (2005) (last visited Feb 16, 2010) (hereafter *German Dispute Resolution Procedures*) (survey of 158 companies in Germany found that litigation is the procedure most frequently used and is perceived to be the least beneficial in many respects, and recommending wide-spread use of dispute resolution clauses in contracts); see Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 *Ohio St. J. on Disp. Resol.* 831 841 (1998) (finding that three companies who had signed a pledge to mediate before adjudicating did not increase their use of mediation).

<sup>24</sup> Penny Brooker & Anthony Lavers, *Mediation Outcomes: Lawyer's Experience with Commercial and Construction Mediation in the United Kingdom*, 5 *Pepp. Disp. Resol. L. J.* 162, 172 (2005); Deborah Hensler, *Our Courts, Ourselves: How the ADR Movement is Re-Shaping Our Legal System*, 108 *Penn. St. L. Rev.* 165, 185-87 (2003). Professor Hensler estimated that half of US state court systems and nearly all of its 94 federal district courts

Canada, England and other common law countries in the 1980s and 1990s. Civil law countries started adapting and adopting these approaches later.<sup>25</sup> For example, the European Parliament approved a directive in 2008 that strongly encourages mediating cross-border commercial disputes.<sup>26</sup> Although several Latin American countries started viewing mediation as a viable option for lawsuits in the 1990s,<sup>27</sup> with the exception of Argentina, none have adopted broad court-connected or judge-mandated use of this process.<sup>28</sup>

The United States is the most litigious country in the world.<sup>29</sup> Because U.S. companies file four times as many lawsuits as individuals do,<sup>30</sup> they are repeat players in the U.S. litigation system. Consequently, executives and managers at most large US companies know the advantages and disadvantages of resolving commercial disputes by litigating.

Surveys of U.S. business men and women show significant awareness of the drawbacks of litigation,<sup>31</sup> and the potential advantages that mediating has as compared to adjudicating commercial disputes. U.S. executives and managers are more likely to suggest using mediation than other clients.<sup>32</sup> Many U.S. executives and managers see mediation as a better way to find outcomes that connect directly to business interests because unlike adjudicating, mediating proceeds without applying law-based frames regarding legal rights, defenses, and remedies.<sup>33</sup> Interests reflect the underlying needs and motivations disputants possess, and they often differ significantly from the frameworks legal claims and remedies embody.<sup>34</sup> Most commercial

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have developed court-mandated or -referred mediation programs. Hensler, *supra* at 185. The state of Florida, for example, authorizes its courts to order “all or any portion” of a contested lawsuit to mediation before a trial date is set. Fla. Stat. 44.011 (2009). This encompasses all commercial law suits filed in Florida courts.

<sup>25</sup> See *Global Trends in Mediation* 7-8, Nadja Alexander, ed., (2d ed. 2006) (hereafter *Global Mediation Trends*).

<sup>26</sup> The Directive is In: *European Union Strongly Backs Cross-Border Mediation*, 26 *Alternatives to High Cost Litig.* 119 (2008) (hereafter *EU Commercial Mediation Directive*).

<sup>27</sup> *Mediation in Latin America*, *supra* note 2, at 415.

<sup>28</sup> In 1995 Argentina enacted a law mandating mediation before any lawsuit, excepting family matters, could reach trial. James M. Cooper, *Latin America in the Twenty-First Century: Access to Justice*, 30 *Cal. W. Int'l L.J.* 429, 433 (2000). From April 1996 through April 1997, 69.43% of 29,986 commercial disputes in litigation that were mediated reached agreement. *Id.* Chile requires a form of mandatory mediation [called conciliation] in consumer protection matters, Sekolec & Getty, *supra* note 5, at 178. Columbia, Ecuador, and Peru also have mediation or conciliation laws. *Id.*; *Mediation in Latin America*, *supra* at 417.

<sup>29</sup> Julia Ann Gold, *ADR Through A Cultural Lens: How Cultural Values Shape Our Disputing Processes*, 2005 *J. Disp. Resol.* 289, 302 n. 88.

<sup>30</sup> Craig A. McEwen, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation*, 14 *Ohio St. J. on Disp. Resol.* 1, 26 (1998); Carmel Sileo & David Ratcliff, *Straight Talk About Torts, Trial*, July 2006, at 44.

<sup>31</sup> Maurits Barendrecht & Berend R. de Vries, *Fitting the Forum to the Fuss with Sticky Defaults: Failure in the Market for Dispute Resolution Services?*, 7 *Cardozo J. Conflict Resol.* 83, 92 (2005).

<sup>32</sup> Wisselle, *supra* note 13, at 204.

<sup>33</sup> See Gans, *supra* note 1, at 53; F. Peter Phillips, *How Conflict Resolution Emerged within the Commercial Sector*, 25 *Alternatives to High Costs Litig.* 3, 6 (2007).

<sup>34</sup> Fisher, et al., *supra* note 6, at 40-50; David A. Lax & James K. Sebenius, *Interests: The Measure of Negotiation*, in *Negotiation: Readings, Exercises, and Cases* 130-37 (Roy J. Lewicki et al. eds, 2d ed 1993).

disputes, for example, have multiple variables, and companies commonly have complex interest sets that interact with these factors in ways that are often individual to each entity.<sup>35</sup>

Commercial disputes encompass business, relational, and procedural factors as well as economic concerns.<sup>36</sup> Common shared company interests in commercial disputes include saving time and money, preserving relationships, and creating satisfactory, durable, and confidential outcomes.<sup>37</sup> Mediation more fully honors these business interests by encouraging looking forward to assess future commercial opportunities rather than emphasizing looking backward, as adjudication does, to determine legal consequences arising from past events.<sup>38</sup> Companies usually care more about solving problems quickly to enhance continued business opportunities than they value winning debates about law applications and establishing new legal doctrines or statutory interpretations.

Developing, creating, and maintaining commercial connections between businesses that are important to long term economic growth takes time and money.<sup>39</sup> U.S. business persons believe that mediation helps resolve disputes while preserving these important relationships better than adjudication does.<sup>40</sup> Mediation helps participants turn disputes into deals by renegotiating contracts to resolve specific problems that permit resuming strengthened commercial relationships,<sup>41</sup> as well as by creating velvet divorces that liquidate associations amicably.<sup>42</sup> In contrast, adjudication more often ends rather than repairs commercial relationships. Adjudication typically assigns blame, produces win-lose outcomes, terminates relationships contentiously, and creates disincentives for companies to do future business together.<sup>43</sup>

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<sup>35</sup> Michael L. Moffitt, Disputes as Opportunities to Create Value, in the Handbook of Dispute Resolution 173, 176 (Michael L. Moffitt & Robert C. Bordone, eds., 2005) (hereafter the Dispute Resolution Handbook).

<sup>36</sup> American Arbitration Association, Dispute-Wise Business Management: Improving Economic and Non-Economic Outcomes in Managing Business Conflicts 19 (2006) (hereafter Dispute-Wise Business Management) (listing these interests as reasons companies use mediation); Appropriate Corporate Dispute Resolution, *supra* note 10, at 19 (1998) (same).

<sup>37</sup> See *id.* [companies listing these factors as reasons for using mediation].

<sup>38</sup> Philips, *supra* note 33, at 6.

<sup>39</sup> See Mediation in Latin America, *supra* note 2, at 424; Thomas W. Walde, Pro-Active Mediation of International Business and Investment Disputes Involving Long-Term Contracts: From Zero-Sum Litigation to Efficient Dispute Resolution, *Transnat'l Disp. Mgmt.*, May 2004, available at <http://www.transnational-dispute-management.com/samples/freearticles/tv1-2article101b.htm>.

<sup>40</sup> Eighty percent of the business executives acknowledged that mediation helps preserve important commercial relationships. Lande, *supra* note 12, at 176. Fifty-nine percent of business persons in another study said that mediation preserves business relationships better than adjudication, Appropriate Corporate Dispute Resolution, *supra* note 10, at 37; and fifty-six percent said the same thing in another study. Dispute-Wise Business Management, *supra* note 36, at 19.

<sup>41</sup> International Mediation, *supra* note 4, at 12-18. For example, many intellectual property disputes begin as rights claims but are resolved as negotiated licensing arrangements. *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Julie Barker, International Mediation—A Better Alternative for the Resolution of Commercial Disputes: Guidelines for a U.S. Negotiator involved in an International Commercial Mediation with Mexicans, 19 *Loy. L.A. Int'l Comp. L.J.* 1, 7 (1996); see International Mediation, *supra* note 4, at 34.

U.S. business men and women believe that mediation produces outcomes in less time than adjudication requires.<sup>44</sup> Eight of ten of executives and managers surveyed concluded that mediation saves time over litigation.<sup>45</sup> U.S. business personnel know that mediating avoids the delays caused by litigation's pleading and evidence assembling processes, and the collateral and costly skirmishes these procedures often generate. Arbitration similarly diverts company time, money, and energy to ancillary legal battles and procedural quarrels.<sup>46</sup> Assuming appropriate company decision-makers willing to negotiate attend, mediations can resolve complex disputes in days rather than months or years.<sup>47</sup> In Latin America, mediation's use of business relevant information allows it to be "fast," not "slow" as occurs in commercial litigation.<sup>48</sup>

Because time is usually a substantial component of expense, U.S. business persons believe that mediation is less expensive than adjudication. Ninety percent conclude that mediation saves money as compared to litigation.<sup>49</sup> Surveying sixty-nine U.S. companies, seventy-one percent reported cost savings when comparing mediation to litigation costs.<sup>50</sup> Another study at one large American corporation showed that mediation settling costs were one-third less than litigation expenses.<sup>51</sup>

U.S. business men and women typically rate mediation above arbitration on all of these business interest measures. For example, arbitration's use of formal, legalistic frames obscures recognition and exploration of business interest-based outcomes by focusing on backward looking facts, evidence, and arguments needed to assert and defend legal rights.<sup>52</sup> U.S. executives believe that mediation preserves commercial relationships better than arbitration

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<sup>44</sup> Can We Talk, *supra* note 19, at 1285-86.

<sup>45</sup> See *Dispute-Wise Business Management*, *supra* note 36, at 19 (84% believe mediation saves time as compared to litigation); *Appropriate Dispute Resolution*, *supra* note 10, at 17 (80.1% believe mediation saves time as compared to litigation).

<sup>46</sup> George W. Combe, Jr., *The Resolution of Transnational Commercial Disputes: A Perspective from North America*, 5 *Ann Surv. Int'l & Comp. L.* 13, 25 (1999); *Can We Talk*, *supra* note 19, at 1259.

<sup>47</sup> The London based Centre for Effective Dispute Resolution reports the average length of its cross border commercial mediations is two days. *International Mediation*, *supra* note 4, at 29. A Scandinavian supplier and an Asian producer chose a three-day meditation rather than an arbitration that the disputes privately estimated would take one to two years to conclude. *Id.* at 6.

<sup>48</sup> *Mediation in Latin America*, *supra* note 2, at 419. Many Latin American countries suffer from slow, bureaucratic, and inefficient judicial systems. *Id.* at 425.

<sup>49</sup> *Dispute-Wise Business Management*, *supra* note 36, at 40 (91%); see *Appropriate Corporate Dispute Resolution*, *supra* note 10, at 17 (89.2%).

<sup>50</sup> Catherine Cronin-Harris & Peter H. Kaskell, *How ADR Finds a Home in Corporate Law Departments*, 15 *Alternatives to High Cost Litig.* 158, 159 (1997).

<sup>51</sup> *Analyzing Company ADR System Practices*, 22 *Alternatives to High Cost Litig.* 47, 53 (2004) (Johnson & Johnson).

<sup>52</sup> *Can We Talk*, *supra* note 19, at 1259; Eric Green, *International Commercial Dispute Resolution: Courts, Arbitration, and Mediation*, 15 *B.U. Int'l L.J.* 175, 177-78 (1997).

does.<sup>53</sup> Although arbitration usually has time and cost advantages over litigation, U.S. business men and women view mediation superior to arbitration in saving time and resolving commercial disputes quicker.<sup>54</sup> Similarly, U.S. business men and women believe that mediation is less expensive than arbitration.<sup>55</sup> They also express more confidence in mediators than arbitrators.<sup>56</sup>

U.S. business men and women who have experienced mediation of commercial disputes report satisfaction with the process and the results of their interactions.<sup>57</sup> Eighty-four percent of U.S. executives also agreed that mediation was appropriate in half or more of their commercial disputes that they were presently litigating.<sup>58</sup> Only sixteen percent of these executives indicated that mediation was appropriate in less than half of the commercial disputes they were litigating.<sup>59</sup>

Evidence suggests that civil legal system-based companies concur. Eighty-four percent of French companies surveyed expressed satisfaction with mediation.<sup>60</sup> All twenty-five Italian companies who responded to another survey thought that their companies could benefit from mediating commercial disputes.<sup>61</sup>

Despite these favorable attitudes toward and experiences with commercial mediation, businesses do not mediate disputes very often. Although some companies successfully use a systemic approach to conflict that requires mediating before adjudicating,<sup>62</sup> a survey of six

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<sup>53</sup> Appropriate Corporate Dispute Resolution, *supra* note 10, at 17 (58.7% choose mediation to preserve relationships as compared to 41.3% choosing arbitration for that reason); Dispute-Wise Business Management, *supra* note 36, at 19 (56% choose mediation to preserve relationships while 38% choose arbitration for this reason).

<sup>54</sup> Appropriate Corporate Dispute Resolution, *supra* note 10 at 17 (as compared to litigation, 80.1% use mediation to save time while 68.5% use arbitration to save time); Dispute-Wise Business Management, *supra* note 36, at 19 (as compared to litigation, 84% use mediation to save time, 73% use arbitration to save time).

<sup>55</sup> A survey of 69 companies showed that 71% reported cost savings when comparing mediation to litigation costs, compared to 44% reporting cost savings comparing arbitration to litigation. Cronin-Harris & Kaskell, *supra* note 50, at 159; see Appropriate Corporate Resolution, *supra* note 10, at 17 (compared to litigation, 89.2% think mediation saves money while 68.6% think that arbitration does); Dispute-Wise Business Management, *supra* note 36, at 40 (compared to litigation, 91% think mediation saves money while 71% think arbitration does).

<sup>56</sup> Lipsky & Seeber, *supra* note 22 at 15. Forty-eight percent of 606 company lawyers surveyed expressed a lack of confidence in arbitrators as compared to 29% expressing this regarding mediators. *Id.* On balance, these commercial lawyers were more satisfied with mediation than with arbitration. *Id.* at 153-54.

<sup>57</sup> See Lande, *supra* note 12, at 176. Reviewing 62 studies evaluating more than 100 court-connected mediation programs showed that more than 70% of litigants were satisfied with mediation, and more than 80% thought the process was fair. Jennifer Shack, Efficiency: Mediation in Courts Can Bring Gains, But Under What Conditions?, 9 *Disp. Resol. Mag.* 11 (2003). Analyzing 9 studies comparing satisfaction and fairness perceptions between citizens who participated in mediation and those who did not found that six showed higher rates for those who mediated while three discerned no difference. *Id.* at 12.

<sup>58</sup> Lande, *supra* note 12, at 172-84.

<sup>59</sup> *Id.*

<sup>60</sup> A New Study Shows How ADR is Perceived by French Business Executives, 64 *Disp. Resol. J.* 13, 13 (2009) (hereafter French Executives' ADR Perceptions).

<sup>61</sup> Giuseppe De Palo & Penelope Harley, Mediation in Italy: Exploring the Contradictions, 21 *Negot. J.* 469, 473 (2005).

<sup>62</sup> The components of a systematic dispute resolution approach include viewing disputes as expected, rather than unusual, occurrences, developing system-wide policies that use mediation before adjudicating to pursue interest-

hundred U.S. companies showed only nineteen percent mediated frequently.<sup>63</sup> Another survey of two hundred fifty companies showed that sixteen percent do not use mediation at all, twenty-five percent rarely use it, and thirty-five percent use it only occasionally.<sup>64</sup>

Similar data exists in civil law countries. One hundred fifty-eight German companies surveyed showed that mediation was generally perceived as beneficial yet used rarely to resolve commercial disputes.<sup>65</sup> A survey of seventy French companies showed only thirty-nine percent mediate commercial disputes.<sup>66</sup> Twenty-five Italian companies believed mediation is beneficial yet forty percent never used it to resolve commercial disputes.<sup>67</sup> Consistent with these results, adjudication provides the most frequently used commercial dispute resolution process in the United States,<sup>68</sup> Europe,<sup>69</sup> and Latin America;<sup>70</sup> litigation for domestic disputes<sup>71</sup> and arbitration for cross border conflicts.<sup>72</sup>

The primary constraint on broader mediation use is self-inflicted because this discrepancy largely results from resistance to using mediation that lawyers display.<sup>73</sup> The unwillingness of dispute counterparts is a principal reason companies do not use mediation and was identified as a barrier by three-quarters of six hundred U.S. corporations surveyed.<sup>74</sup> Although some of this resistance undoubtedly results from dictates to adjudicate made by executives and managers, research disclosed no data regarding how often choices to adjudicate a commercial dispute are made after a full comparison with mediation's advantages and disadvantages.

Considerable evidence suggests that this comparison does not happen frequently in the United States. Adjudicating is often the only dispute resolution alternative identified and

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based resolutions, and directing lawyers to follow this approach. See *Can We Talk*, supra note 19, at 1290-91; *Dispute-Wise Business Management*, supra note 36, at 3-6, 22; *McEwen*, supra note 30, at 10-11. Companies that have established this approach are more likely to resolve commercial disputes quicker and at less cost. *Dispute-Wise Business Management*, supra at 21.

<sup>63</sup> *Appropriate Corporate Dispute Resolution*, supra note 10, at 10.

<sup>64</sup> *Dispute-Wise Business Management*, supra note 36, at 17.

<sup>65</sup> *German Dispute Resolution Procedures*, supra note 23.

<sup>66</sup> *French Executives' ADR perceptions*, supra note 60, at 13.

<sup>67</sup> *De Palo & Harley*, supra note 61, at 473.

<sup>68</sup> *Gold*, supra note 29, at 302 (litigation is the "default American dispute resolution process"); See *Appropriate Corporate Dispute Resolution*, supra note 10 at 10 (small percentage of U.S. companies use mediation frequently); *Dispute-Wise Business Management*, supra note 36, at 17 (76% of U.S. companies use mediation occasionally, rarely, or not at all).

<sup>69</sup> *De Palo & Harley*, supra note 61, at 473; *German Dispute Resolution Procedures*, supra note 23 (Litigation is the procedure most frequently used to resolve commercial disputes and is perceived to be least beneficial in most respects).

<sup>70</sup> *Mediation in Latin America*, supra note 2, at 428-29.

<sup>71</sup> See notes 68, 69 supra.

<sup>72</sup> *Can We Talk*, supra note 19, at 1261.

<sup>73</sup> *International Mediation*, supra note 4, at 114 (the greatest constraint on mediation usage is self-imposed resulting from the fact that managers and lawyers often resist entering the process).

<sup>74</sup> *Appropriate Corporate Dispute Resolution*, supra note 10, at 26.

analyzed by U.S. lawyers.<sup>75</sup> One survey showed that counsel had not mentioned mediation as an option in seventy commercial lawsuits proceeding that year.<sup>76</sup> A survey of twenty-three hundred Ohio lawyers showed that only fourteen percent regularly recommended mediation to their clients.<sup>77</sup> Several studies showed that large percentages of U.S. lawyers rarely use mediation.<sup>78</sup> These surveys also show that less than seventeen percent reported using mediation often, usually, or always.<sup>79</sup>

Minimal use of commercial mediation also occurs in civil law countries. Local bar associations in Latin American countries express skepticism toward mediation.<sup>80</sup> Although a close fit between Latin American culture and mediation exists, mediating has not been an easy sell in these countries despite its advantages over adjudication.<sup>81</sup> Three years after Poland introduced mediation to its Civil Procedure Code, Polish lawyers demonstrate reluctance to mediate commercial disputes.<sup>82</sup> Legislative activity in Italy has not generated a substantial commitment to use mediation in the Italian legal community.<sup>83</sup> Sixty-eight percent of Italian companies surveyed reported that lawyers did not encourage them to consider mediation as an alternative to adjudication.<sup>84</sup>

Commercial disputants report frequent use of adjudication even when the benefits of using mediation are apparent.<sup>85</sup> A detailed analysis of six large U.S. corporations disclosed failure to increase use of mediation even though business principals supported expanded use.<sup>86</sup> A general counsel for one of these companies said that he could not think of an initiative he had more difficulty selling than mediating commercial disputes because lawyers “were generally so resistant.”<sup>87</sup>

This article analyzes this resistance found in both common law U.S. lawyers and civil law system Latin American lawyers. This analysis argues that biases flowing from the way human brains perceive and make decisions substantially influence this resistance. It also contends that

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<sup>75</sup> Can We Talk, *supra* note 19, at 1294.

<sup>76</sup> CPR Institute for Dispute Resolution Spring Meeting—June 1996, 14 *Alternatives to High Cost Litig.* 98 (1996).

<sup>77</sup> Wisselle, *supra* note 13, at 221. (59% said they sometimes recommended mediation and 27% said they never recommended mediating).

<sup>78</sup> *Id.* at 211 (most attorneys who had used mediation reported using it in 25% or less of their cases).

<sup>79</sup> *Id.*

<sup>80</sup> *Mediation in Latin America*, *supra* note 2, at 427.

<sup>81</sup> *Id.* at 428.

<sup>82</sup> Don Peters & Ewa Gmurzynska, *Yes We Can: Overcoming Barriers to Mediating Private Commercial Disputes*, 7 *Warsaw University L. Rev.* 122, 126-27 (2008).

<sup>83</sup> De Palo & Harley, *supra* note 61, at 473.

<sup>84</sup> *How Business Conflict Resolution Is Being Practiced in China and Europe*, 23 *Alternatives to High Cost Litig.* 148, 149 (2007) (68% of Italian companies said they did not use mediation more often because their counsel did not identify it as an option).

<sup>85</sup> Lipsky & Seeber, *supra* note 22, at 145.

<sup>86</sup> Rogers & McEwen, *supra* note 23, at 841.

<sup>87</sup> *Id.* at 841-42.

shared legal cultural factors resulting from similarities in how law is used to resolve disputes in adjudication and how lawyers are educated significantly explain this resistance. This article then examines factors which combine to reduce the influence that differences in how common law and civil system lawyers practice might otherwise have when helping clients decide how to approach resolving commercial disputes. It concludes by presenting reasons why carefully assessing mediation as a pre-adjudication option helps lawyers counter perceptual, decision-making, and legal cultural biases while allowing commercial clients to avoid the risks and substantial transaction costs inherent in adjudicating disputes.

### **III. PERCEPTUAL AND DECISION-MAKING BIASES INFLUENCING BOTH COMMON LAW AND CIVIL SYSTEM LAWYERS**

All decision-making and behavioral activity involved in identifying, explaining, recommending, and implementing commercial dispute resolution options, like all human choice and action, starts with perception.<sup>88</sup> Humans perceive through their sensory receptors of sight, sound, touch, smell, and taste.<sup>89</sup> Meanings derived from these perceptions influence decisions, predictions, and actions. Recent scientific research demonstrates that humans form these meanings largely as the result of emotional reactions, and they may or may not then subject these responses to conscious, cognitive reflection, review, and adjustment.

Contemporary science has demonstrated that human decisions result from interactions between different brain networks, many of which produce emotion.<sup>90</sup> Wide agreement now exists that human brains essentially use two different decision-making methods: a conscious, logical, slow process of thinking through perceptions and alternatives; and a quicker, emotion based system that operates largely below the surface of consciousness.<sup>91</sup> Although the conscious cognitive brain gets virtually all of the attention in decision-making theory and literature, most of what humans think and do is really driven by their emotions.<sup>92</sup> Many, if not most, human decisions and actions are either made or strongly influenced by these quick, effortless, emotional brain reactions.<sup>93</sup>

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<sup>88</sup> Don Peters, *Forever Jung: Psychological Type Theory, The Myers-Briggs Type Indicator, and Learning Negotiation*, 32 *Drake L. Rev.* 1, 13 (1993).

<sup>89</sup> Gold, *supra* note 29, at 293; Larry A. Samovar & Richard E. Porter, *Intercultural Communication* 10 (9<sup>th</sup> ed. 2000).

<sup>90</sup> Jonah Lehrer, *How We Decide* xv (2009).

<sup>91</sup> Malcolm Gladwell, *Blink: The Power of Thinking Without Thinking* 10 (2005).

<sup>92</sup> Lehrer, *supra* note 90, at 23; Wendell Jones & Scott H. Hughes, *Complexity, Conflict Resolution, and How the Mind Works*, 20 *Conflict Resol. Q.* 485, 487 (2003).

<sup>93</sup> Leher, *supra* note 90, at 26-27.

Although lawyers believe that their analyses, predictions, and decisions are rational, substantial evidence suggests that these beliefs are not accurate.<sup>94</sup> Many identifiable emotional and cultural factors frequently distort rational decision-making.<sup>95</sup> Many occur as the result of how rapid, below conscious emotional brain systems perceive, interpret, and respond to information. Many others occur as the result of neural shortcuts used when working with complex decisions such as those involved in identifying, explaining, and evaluating commercial dispute resolution methods.<sup>96</sup> Humans are more likely to use emotion brain-based perception and neural short cuts when making decisions confronting uncertain situations,<sup>97</sup> and commercial disputes, at least initially, generally generate substantial uncertainty.

Occurring rapidly and largely below conscious awareness, emotion-based decision-making influences are difficult to detect and counter.<sup>98</sup> Although these systems frequently work well, they occasionally misfire for specific, consistent reasons.<sup>99</sup> These misfires often create biased, ineffective, non-optimal decisions and actions. Many of these common decision-making biases occur frequently when resolving disputes, and several influence choosing resolution options.<sup>100</sup> They often interact and combine to influence decisions to adjudicate rather than mediate commercial disputes.

Human decision-making begins with initial perception. To manage the overwhelming external stimuli that human brains confront, people perceive selectively in potentially biased ways by noticing and emphasizing some aspects of events and situations while ignoring others.<sup>101</sup> Human perceptual experiences differ. Everyone selects, evaluates, and organizes external stimuli in unique ways so persons often interpret the same event, situation, or context differently.<sup>102</sup> Perception is influenced by what humans have learned and experienced in their

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<sup>94</sup> Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 *Harv. Negot. L. Rev.* 1, 1-2 (1999).

<sup>95</sup> Robert H. Mnookin, et al., *Beyond Winning: Negotiating to Create Value in Deals and Disputes* 156 (2000).

<sup>96</sup> Robert S. Adler, *Flawed Thinking: Addressing Decision Biases in Negotiation*, 20 *Ohio St. J. on Disp. Resol.* 683, 690-91 (2005); Russell Korobkin & Chris Guthrie, *Heuristics and Biases at the Bargaining Table*, in *Negotiator's Fieldbook: The Desk Reference for the Experienced Negotiator* 351 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006) (hereafter *Negotiator's Fieldbook*).

<sup>97</sup> Lehrer, *supra* note 90, at 76.

<sup>98</sup> Birke & Fox, *supra* note 94, at 3-4.

<sup>99</sup> Gladwell, *supra* note 91, at 15.

<sup>100</sup> See generally *Can We Talk*, *supra* note 19, at 1263-75.

<sup>101</sup> Sheila Heen & Douglas Stone, *Perceptions and Stories*, in *Negotiator's Fieldbook*, *supra* note 96, at 343, 345-47. An ensemble of alerting, orienting, and executive brain networks collaborate during perception. Winifred Gallagher, *Rapt Attention and the Focused Life* 8 (2009). They attune people to what's going on in their outer and inner worlds, using a basic mechanism that selects some aspects of perception and suppressing the rest. *Id.* at 8-9. Human brains select a thin slice of what is going on, represents or depicts it, stores it, and then makes this part of perceivers' reality. *Id.*

<sup>102</sup> Gold, *supra* note 29, at 293. Business persons from different parts of the same organization often see dispute contexts and situations differently. Heen & Stone, *supra* note 101, at 344 (in any organization, were you sit influences what you see).

environments and their past.<sup>103</sup> People construct reality on foundations of what they pay attention to and how they use their expectations, interests, and experiences to construe meanings.<sup>104</sup>

Selective perception reflects human tendencies to perceive in self-serving ways.<sup>105</sup> Human brains work hard to tell simple stories consistent with what they know to protect themselves from ill-fitting data.<sup>106</sup> People typically assume they are objective and reasonable when confronting problems.<sup>107</sup> Applying false consensus bias, humans also assume that others looking at the same data would draw the same conclusions,<sup>108</sup> and they often erroneously attribute unreasonable or harmful motives to others who reach different interpretations.<sup>109</sup>

When differences arise, humans inaccurately believe that they have perceived all important data,<sup>110</sup> and they attend to information that justifies their perspectives while ignoring other stimuli. This selective perceptual process mirrors adjudication which encourages limited information assessment by requiring asserting and substantiating claims that travel on some but not all potentially useful data present in complex situations. Adjudication also assumes that this legally relevant data is all that matters for resolving commercial disputes.

Selective perception contributes to self-serving, biased attribution. Attribution theory analyzes how humans attribute causal meaning to behavior.<sup>111</sup> In order to achieve a sense of control in their lives, people routinely seek to perceive causes that explain their behaviors and the

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<sup>103</sup> Gold, *supra* note 29, at 293.; Heen & Stone, *supra* note 101, at 344; Daniel L. Schacter, *Searching for Memory: The Brain, The Mind, and the Past* 3 (1996). Brain nerve cells translate incoming sensory information into explicit representations that support and are influenced by a person's previous knowledge of the world from learning and experience. Gallagher, *supra* note 101, at 20.

<sup>104</sup> Jean R. Sternlight & Jennifer Robbennolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 *Ohio St. J. on Disp. Resol.* 437, 451-53, 463 (2009). People ordinarily perceive things "in synchrony with [their] accumulated knowledge, which enriches and defines" their experiences and ensures "its uniqueness." Gallagher, *supra* note 101, at 25.

<sup>105</sup> Max Bazerman & Katie Shonk, *The Decision Perspective to Negotiation*, in *Dispute Resolution Handbook*, *supra* note 35, at 52, 55; Birke & Fox, *supra* note 94, at 14; Korobkin & Guthrie, *supra* note 96, at 354.

<sup>106</sup> Heen & Stone, *supra* note 101, at 346-47.

<sup>107</sup> Keith G. Allred, *Relationship Dynamics in Disputes: Replacing Contention with Cooperation*, in *Dispute Resolution Handbook*, *supra* note 35, at 83-84.

<sup>108</sup> Melissa Janis, *Perceptual Errors in Mediation*, 56 *Disp. Resol. J.* 50, 51 (2001). Humans overestimate the degree to which others share their perspectives. Sternlight & Robbennolt, *supra* note 104, at 464. False consensus bias describes human tendencies to assume that their perceptions, attitudes, behaviors, and lifestyle preferences are the measures of normality and correctness. Janis, *supra* at 51.

<sup>109</sup> Allred, *supra* note 107, at 83-84. This is a form of attribution bias discussed later. See notes 115-118 *infra* and accompanying text.

<sup>110</sup> Heen and Stone, *supra* note 101, at 344. Called user illusion, humans typically believe they perceive everything important in situations but in fact brains take in only small slices of available information, and often as little 1% of a stimulus field. *Id.*

<sup>111</sup> Russell Korobkin, *Psychological Biases that Become Mediation Impediments Can Be Overcome with Interventions that Minimize Blockages*, 24 *Alternatives to High Cost Litig.* 67, 69 (2006).

actions of those with whom they interact.<sup>112</sup> Determining the causes of events lets people predict future occurrences.<sup>113</sup> People categorize behavioral causes as internal, resulting from a person's individual characteristics, or external or situational, stemming from things outside the actor's control.<sup>114</sup>

Biased attribution stems from human tendencies to attribute another's actions to internal characteristics while perceiving that their own behaviors result from external factors.<sup>115</sup> Humans tend to prefer simple to more complex causal explanations and are more likely to assign responsibility to others when they judge behavioral causes are internal and controllable.<sup>116</sup> When disputes escalate, biased attribution assumes others' difficult, problematic, or harmful behavior came from their negative characteristics.<sup>117</sup> Humans easily perceive harmful intent by others from negative impacts and consequences their actions cause while simultaneously explaining their own similar behaviors as resulting from contextual factors beyond their control.<sup>118</sup> Biased attributions frequently increase disputants' anger levels beyond what is objectively justified, encourage them to retaliate, and influence them to adjudicate to punish counterparts.<sup>119</sup>

Biased human perception, attribution, and decision-making risks multiply when disputing dynamics transform perception from selective to partisan.<sup>120</sup> Partisan, contentious business cultures exist, and they create disagreements, escalate them into disputes, and erect barriers to considering mediating before adjudicating.<sup>121</sup> Many, if not most, commercial disputes engender intense emotional and partisan feelings in the people involved.<sup>122</sup> Disputes generate strong emotions reflecting anger, distrust, and interests in self-preservation that influence dispute resolution process selection.<sup>123</sup> Powerful feelings of suspicion, betrayal, and disrespect often influence desires for achieving vindication, using professional advocates, and punishing dispute

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<sup>112</sup> Janis, *supra* note 108, at 51.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> Korobkin, *supra* note 111, at 70.

<sup>116</sup> Sternlight & Robbenolt, *supra* note 104, at 461.

<sup>117</sup> Douglas Stone et al., *Difficult Conversations: How To Discuss What Matters Most* 46-47 (hereafter *Difficult Conversations*).

<sup>118</sup> *Id.* at at 46-48. The negative causal attributions often generate judgments of responsibility and blame.

Sternlight & Robbenolt, *supra* note 104, at 461-62.

<sup>119</sup> Korobkin, *supra* note 111 at 70.

<sup>120</sup> Roger Fisher, et al., *Beyond Machiavelli: Tools For Coping With Conflict* 21-31 (1994).

<sup>121</sup> McEwen, *supra* note 30, at 55. "Tough guy" cultures and "macho management" influence adversarial position-taking that generate as well as exacerbate disputes. *International Mediation*, *supra* note 4, at 115.

<sup>122</sup> Commercial litigation is often driven by emotional, not economic, factors. *Inside the Law Firm: Dealing with Financial Disincentives to ADR*, 17 *Alternatives to High Cost Litig.* 43, 45 (1999) (hereafter *Financial Disincentives to ADR*).

<sup>123</sup> See *Can We Talk*, *supra* note 19, at 1275-76. Demonstrating the reality that commercial disputes are usually personal conflicts in disguise, commercial lawyers frequently confront managers and executives who think they have been wronged and consequently dig in their heels. McEwen, *supra* note 30, at 10. In addition, employees who have made decisions generating disputes want management support and fear undermined if mediation threatens outcomes that do not fully vindicate their actions. *Appropriate Corporate Dispute Resolution*, *supra* note 10, at 34.

counterparts. All of these emotions influence choosing to adjudicate commercial disputes to achieve vindication by winning and inflicting harm.

Partisan emotions slow perceptions, mask subtleties, discount specifics, and produce crude, less complex decisions.<sup>124</sup> They often generate feelings of threat, risk, and danger that stimulate powerful yet primitive emotional brain-based flight or flight responses.<sup>125</sup> This powerful Paleolithic instinct generates preferences for legalized fighting by adjudicating.<sup>126</sup>

Partisan perception hardens commitments to beliefs and further narrows information gathering. It reinforces tendencies to seek only information supporting existing views, to ignore or discount disconfirming data, and to resist changing perspectives when confronted by discrepancies.<sup>127</sup> In extreme forms, partisan perception reactively devalues what disputing counterparts say and do.<sup>128</sup> These narrowing effects of partisan emotions actively discourage seeking to learn or remember the perspectives and interests of others,<sup>129</sup> encourage either-or adjudicatory thinking, and hinder both-and approaches that mediation encourages.<sup>130</sup>

Sharing a professional tradition of intense commitment to their client's cause, U.S. common law and Latin American civil system lawyers risk reinforcing partisan emotions when discussing commercial dispute resolution options with angry, distrustful, and threatened clients.<sup>131</sup> Sometimes U.S. lawyers intentionally stoke their clients' emotional fires to encourage adjudicatory choice.<sup>132</sup> More often, lawyers remain neutral initially but personally experience partisan perception after adjudication is selected and produces quarrels and skirmishes. These

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<sup>124</sup> Heen & Stone, *supra* note 101, at 345.

<sup>125</sup> See Douglas H. Yarn & Gregory Todd Jones, In our Bones (Or Brains): Behavioral Biology, in *The Negotiator's Fieldbook* 283, 284-85 (Andrea Kupfer Schneider & Christopher Honeyman eds. (2006)(hereafter *Negotiator's Fieldbook*) (competitive behavior is understandable from a biological perspective because enhances chances of survivability in a prehistoric world of scarce resources). Human behavior at its most fundamental level is about the brain's receiving stimuli, making computations based thereon, and directing actions. *Id.*

<sup>126</sup> International Mediation, *supra* note 4, at 4-5 (noting that managers around the world do not like conflicts and often experience flight-or-flight reactions, and choose to worsen situations by legalized fighting, or adjudication, or to flee problems by ignoring them and doing nothing].

<sup>127</sup> Barendrect & deVries, *supra* note 31, at 98; Fisher, et al., *supra* note 34, at 22.

<sup>128</sup> Deepak Malhotra & Max H. Bazerman, *Negotiation Genius: How To Overcome Obstacles and Achieve Brilliant Results at the Bargaining Table and Beyond* 110-11.(2007).

<sup>129</sup> Barendrect & deVries, *supra* note 31 at 98; Fisher, et al., *supra* note 34 at 22-28; Daniel Kahneman & Amos Tversky, *Conflict Resolution: A Cognitive Perspective*, in *Barriers to Conflict Resolution* 44, 47 (Kenneth Arrow et al. eds. 1995).

<sup>130</sup> See *Difficult Conversations*, *supra* note 117, at 39-40 (recommending accepting different perceptions, working to understand them, and once mutual understanding is achieved, finding effective ways to manage disagreements and solve problems).

<sup>131</sup> See Daniel Goleman, *Social Intelligence: The New Science of Human Relationships* 14-16 (suggesting that the field of social neuroscience reveals that all human interactions have emotional subtexts that are contagious and often transfer automatically from one to the other) (2006); Daniel L. Shapiro, *Untapped Power: Emotions in Negotiation*, in *Negotiator's Fieldbook*, *supra* note 96, at 263, 265 (arguing that humans are in a state of perpetual emotion and constantly experience affective states).

<sup>132</sup> See Mnookin, et al., *supra* note 95, at 167.

preliminary adjudicatory battles often influence U.S. lawyers to transfer partisan adjudicatory thinking and acting to mediating in ways that substantially interfere with exploring business interests and non-legal solutions.<sup>133</sup>

Incomplete and distorted selective and partisan perception breeds additional biases resulting from egocentrism-based optimistic overconfidence.<sup>134</sup> Overconfidence leads humans to discount small probabilities, distort unattractive consequences, and assume luck runs in their favor.<sup>135</sup> These egocentric tendencies also encourage humans to bias predictions in self-serving ways that reflect preexisting beliefs.<sup>136</sup>

Professionals in many occupations tend to make unrealistically overconfident or optimistic forecasts regarding future outcomes.<sup>137</sup> This frequently happens when professionals estimate outcome probabilities that depend upon a series of events.<sup>138</sup> Adjudication frequently requires prevailing on multiple legal issues and factual questions.<sup>139</sup> Consequently, many biased predictions by lawyers involve overconfidently forecasting adjudication outcomes.

Predicting future adjudication outcomes substantially influences commercial dispute method choice and biased overconfident, unrealistic forecasts commonly occur. U.S. lawyers routinely demonstrate optimistic overconfidence.<sup>140</sup> U.S. lawyers in one study rated themselves in the 80<sup>th</sup> percentage or higher of all lawyers on their abilities to predict litigation outcomes.<sup>141</sup> Biased, inaccurate future outcome predictions often influence lawyers to recommend adjudication, and their clients frequently follow this advice based primarily on these forecasts.<sup>142</sup>

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<sup>133</sup> Business Mediation: From All Points of View, 24 *Alternatives to High Cost Litig.* 101, 101 (2006); Can We Talk, *supra* note 19, at 1270.

<sup>134</sup> Barendrect & deVries, *supra* note 31, at 98. Humans typically underestimate time needed to complete tasks, overestimate how much they will enjoy jobs and vacations, and mispredict the chances marriages will end in divorce. Sternlight & Robennolt, *supra* note 104, at 469.

<sup>135</sup> Donald R. Philbin, Jr., The One Minute Manager Prepares for Mediation: A Multidisciplinary Approach to Negotiation Preparation, 13 *Harv. Negotiation L. Rev.* 249, 282 (2008).

<sup>136</sup> Bazerman & Shonk, *supra* note 105, at 55; Birke & Fox, *supra* note 94, at 14; Korobkin & Guthrie, *supra* note 96, at 354.

<sup>137</sup> Bazerman & Shonk, *supra* note 105, at 57; Birke & Fox, *supra* note 94, at 18. For example, expert financial analysts tend to overestimate earnings. Sternlight & Robennolt, *supra* note 104, at 469.

<sup>138</sup> Jean R. Sternlight, Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting, 14 *Ohio St. J. on Disp. Resol.* 269, 307 fn 133 (1999).

<sup>139</sup> If a litigant must prevail on four contested points to win a case, such as two legal issues and two factual questions, and the likelihood of winning on each is 50%, this party's overall chance of winning is only 12.5%. *Id.* See Amos Tversky & Daniel Kahneman, Judgment Under Uncertainty: Heuristics and Biases 3, 11. 14 (Daniel Kahneman et al eds., 1982).

<sup>140</sup> Richard Birke, Settlement Psychology: When Decision-Making Processes Fail, 18 *Alternatives to High Cost Litig.* 212, 214 (2000).

<sup>141</sup> *Id.* One experiment showed that dividing subjects into plaintiff and defendant groups and presenting them with identical evidence produced a median plaintiff estimate of success at 75% while a median defense estimate was 55%. Howard Raiffa, *The Art and Science of Negotiation* 75 (1982).

<sup>142</sup> Berendrect & de Vries, *supra* note 31, at 99; Birke & Fox, *supra* note 94, at 15; Bazerman & Shronk, *supra* note 104, at 57.

Commitments to adjudicate often harden when commercial clients independently reach equally optimistically overconfident predictions that amplify and reinforce their lawyers' biased forecasts.<sup>143</sup>

The narrowed perception influenced by selective perception combined with and intensified by partisan emotions creates assumptions that what disputants' value in disputes is limited and diametrically opposed.<sup>144</sup> Called fixed pie and zero sum biases, these assumptions reflect human tendencies to assume that persons always want only the same things, and that they value these dispute elements identically. Applying these beliefs means that one disputant's gain is inevitably another participant's loss.<sup>145</sup> Law's tendency in both common and civil law traditions to measure rights and remedies in monetary terms reinforces these assumptions. These biased assumptions influence U.S. common law and Latin civil law attorneys to recommend adjudication because it conflates all commercial interests into either-or claims where winners get everything while losers receive nothing.

Distorted selective and partisan perception, fixed pie and zero sum biases, and optimistic overconfidence often combine to activate a powerful, emotion-based mental habit, loss aversion.<sup>146</sup> Loss aversion motivates humans to escape anything that feels like loss. People are more motivated to avoid losses than to achieve gains.<sup>147</sup> This powerful mental habit often shapes human decisions<sup>148</sup> by influencing choices and actions that attribute more weight to avoiding loss than achieving gain.<sup>149</sup> Loss aversion is an innate emotional flaw in human brains, and everyone who experiences emotion is vulnerable to its affects.<sup>150</sup>

Humans assess losses or gains in relation to anchoring reference points that they assume are neutral.<sup>151</sup> Adjudication outcome predictions provide the anchoring references usually used in choosing dispute resolution options for commercial disputes. Anchoring and framing choices this way requires comparing optimistically overconfident adjudication forecasts of winning against uncertain mediation outcomes which frequently require reframing or retreating from

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<sup>143</sup> Sternlight, *supra* note 138, at 327. Psychologists have noticed a group think dynamic that occurs and heightens commitment to biased decisions. Gary Mendelsohn, *Lawyers as Negotiators*, 1 *Harv. Negotiation L. Rev.* 139, 146-48 (1996).

<sup>144</sup> Malhorta & Bazerman, *supra* note 128, at 108-12; Bazerman & Shonk, *supra* note 105, at 54; Birke & Fox, *supra* note 94, at 30

<sup>145</sup> Leigh Thompson & Janice Nadler, *Judgmental Biases in Conflict Resolution and How to Overcome Them*, in the *Handbook of Conflict Resolution* 213,216-17 (Morton Deutsch & Peter T. Coleman, eds. 2000).

<sup>146</sup> Leher, *supra* note 90, at 77.

<sup>147</sup> Malhorta & Bazerman, *supra* note 128, at 160. People will work harder to avoid losing money than they will to gain the same amount. Gallagher, *supra* note 101, at 32.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*; Mnookin et al., *supra* note 95, at 161.

<sup>150</sup> Leher, *supra* note 90, at 81.

<sup>151</sup> Mnookin et al., *supra* note 95, at 161; see Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 *Science* 453, 456 (1981).

these biased litigation or arbitration predictions. This comparison explains why lawyers fear that mediating lessens chances to maximize gain.<sup>152</sup> It explains why attorneys often associate mediation with making concessions.<sup>153</sup> It also explains why many lawyers believe mediating is a “euphemism for taking less money.”<sup>154</sup>

All of these predictable emotional brain-based responses and inaccurate mental shortcuts are commonly experienced by U.S. and Latin American lawyers when discussing dispute resolution methods with their commercial clients. They frequently interact and combine to produce a powerful and pervasive win-lose mindset.<sup>155</sup> Based on these assumptions, this mindset produces actions that frame all dispute resolution activities as exclusively or primarily requiring gain-maximizing actions.

Investigations of how professionals develop competence suggest that the most frequent actions displayed by lawyers, business men and women, public administrators, and industrial managers flow from this mindset and demonstrate striving to win and seeking not to lose.<sup>156</sup> Economic theories and business models that advance winning and avoiding losing as primary, often exclusive, objectives reinforce this mindset.<sup>157</sup> So do general cultural practices such as organizational promotion systems and athletic activities.<sup>158</sup>

This win-lose mindset produces substantial resistance to using mediation.<sup>159</sup> U.S. lawyers usually approach dispute resolution with this win-lose mindset,<sup>160</sup> use it during resulting interactions,<sup>161</sup> and resist disconfirming information.<sup>162</sup> Surveys show pervasive use of win-lose mindset assumptions and actions by U.S. lawyers negotiating and settling disputes.<sup>163</sup>

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<sup>152</sup> Moore, *supra* note 4, at 82; Don Peters, *To Sue Is Human: To Settle Divine: Intercultural Collaborations to Expand the Use of Mediation in Costa Rica*, 17 Fla. J. Int'l L. 9, 11 (2005) (hereafter *Mediation in Costa Rica*).

<sup>153</sup> *Appropriate Corporate Dispute Resolution*, *supra* note 10, at 26; Berendrect & deVries, *supra* note 31, at 83.

<sup>154</sup> *Arbitration/Mediation/Settlement/Other Forms of ADR, 15 Alternatives to High Cost Litig.* 59, 62 (1997).

<sup>155</sup> Mnookin, et al., *supra* note 95, at 168. “A mindset is a way of making sense of the world” based on “relevant knowledge and belief structures, congruent ways of thinking,” and “specific situational cues.” Barbara O’Brien & Daphna Oyserman, *It’s Not Just What You Think, But Also How You Think About It: The Effect of Situationally Primed Mindsets on Legal Judgments and Decision-Making*, 92 *Marquette L. Rev.* 149, 151 (2008); see notes 173-79 *infra* and accompanying text.

<sup>156</sup> Chris Argrīs & Donald A. Schon, *Theory in Practice: Increasing Professional Effectiveness* 63-84 (1974); Donald A. Schon, *Educating the Reflective Practitioner: Toward a New Design for Teaching and Learning in the Professions* 256-59 (1987); Lee Bolman, *Learning and Lawyering: An Approach to Education for Legal Practice*, in *Advances in Experiential Social Process* 111, 119-20 (Gary L. Cooper & Clayton P. Alderfer eds. 1978).

<sup>157</sup> Alfie Kohn, *No Contest: The Case Against Competition* 70 (1986).

<sup>158</sup> Bazerman & Shonk, *supra* note 105, at 54.

<sup>159</sup> Catherine Cronin-Harris, *Mainstreaming Corporate Use of ADR*, 59 *Albany L. Rev.* 847, 861 (1996); Marguerite Millhauser, *ADR as a Process of Change*, 6 *Alternatives to High Cost Litig.* 190, 190 (1988).

<sup>160</sup> Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 *UCLA L. Rev.* 754, 574-75 (1984); Don Peters, *Mapping, Modeling, and Critiquing: Facilitating Learning Negotiation, Mediation, Interviewing, and Counseling*, 48 *Fla. L. Rev.* 875, 914 (1996).

<sup>161</sup> Birke & Fox, *supra* note 94, at 30-31; Leigh Thompson & Terri DeHarpport, *Social Judgment, Feedback, and Interpersonal Learning in Negotiation*, 58 *Organizational Behav. & Hum. Decision Processes* 327 (1994).

Any one of these biased emotion brain-based perceptual processes and decision-making short cuts is sufficient to influence U.S. and Latin American lawyers to recommend adjudication to resolve commercial disputes than cannot be resolved by non-mediated negotiation. These processes and short cuts interact and combine, however, to produce a powerful cumulative influence toward adjudication and away from mediation. Consequently, most US lawyers and probably many Latin American attorneys perceive adjudication as the fallback option to use if non-mediated negotiations fail without awareness that this view sacrifices advantages that mediating brings in many situations.<sup>164</sup>

#### IV. LEGAL CULTURAL INFLUENCES

Moving from universal, hard-wired emotional-brain and neural short cut-based biases, culture, defined as shared beliefs, values, expectations, and behavioral norms within groups and professions,<sup>165</sup> also influences perception. Humans store perceptions in the form of beliefs and values which work in combination to form cultural patterns.<sup>166</sup> These learned beliefs guide cognitive brain activity and influence decisions.<sup>167</sup> Beliefs form the basis of values which supply learned but largely unwritten, often unconscious, rules for making choices regarding which actions are appropriate.<sup>168</sup>

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<sup>162</sup> Birke & Fox, *supra* note 94, at 31.

<sup>163</sup> Donald G. Gifford, *Legal Negotiations: Theory and Applications* 29 n.6 (1989); Peters, *supra* note 160, at 28 n1. Sixty-seven percent of two thousand Arizona and Colorado lawyers surveyed indicated that they primarily sought to maximize gain when negotiating. Gerald W. Williams, *Legal Negotiation and Settlement* 15-40 (1983). A study of 515 New Jersey lawyers and 55 judges showed that 70% of the cases in which they participated were resolved in win-lose based negotiating. Milton Heumann & Jonathan M. Hyman, *Negotiation Methods and Litigation Settlement Methods in New Jersey: You Can't Always Get What You Want*, 12 *Ohio St. J. On Disp. Resol.* 253, 255 (1997).

<sup>164</sup> Berendrect & deVries, *supra* note 31, at 111.

<sup>165</sup> Can We Talk, *supra* note 19, at 1275; Gold, *supra* note 29, at 292-93; see Melanie Lewis, *Systems Design Means Process Precision, but Emphasizes Culture, Value, and Results*, 25 *Alternatives to High Cost Litig.* 116, 117 (2007). Significant civil legal system differences exist which make common law understandings of the term "legal profession" problematic. Richard L. Abel, *Lawyers in the Civil World*, in *Lawyers in Society: The Civil Law World*, 1, 4-5 (Richard L. Abel & Philip S.C. Lewis eds. (1988) (hereafter *The Civil Law World*). Although lawyers in private practice comprise the core of a common law county's legal profession, other categories of law graduates in civil law countries, such as the magistracy and civil servants, typically predominate numerically and historically. *Id.* at 4. Civil law systems also typically include as legal occupations groups not counted in common law legal professions including notaries everywhere, police chiefs in Brazil and Norway, and process servers in France. *Id.* at 4-5. For comparative purposes, this essay analyzes only those members of civil law legal systems who engage in private practice, using an inaccurate assumption that they constitute the legal profession in these countries.

<sup>166</sup> Gold, *supra* note 29, at 293. .

<sup>167</sup> *Id.* at 293-94.

<sup>168</sup> *Id.* at 294.

Professions possess an abstract knowledge base along with shared norms and educational experiences that derive from and reinforce their core knowledge.<sup>169</sup> Even though they stem from different traditions regarding law's source and development,<sup>170</sup> U.S. and Latin American legal professions use law as their shared knowledge base. They also share norms and educational experiences linked to law, legal doctrines, and procedural rules. While no US or Latin American lawyer always behaves in precisely the same ways,<sup>171</sup> most share tendencies that are revealed in their actions.<sup>172</sup> Reflecting legal cultural influences, these tendencies flow from both similarities and differences in common law and civil law systems, and both more often encourage adjudication than mediation of commercial disputes.

### A. Influences from Legal Cultural Similarities

U.S. common law and Latin civil system lawyers share a professional legal culture that strongly emphasizes using law and its rights and remedies as the framework for resolving disputes peacefully through adjudication. This framework generates tendencies in U.S. lawyers to unquestionably assume that disputes should be resolved by applying legal rules to fact situations embedded in disputes.<sup>173</sup>

Latin American lawyers share this assumption. A commercial representative discussing mediation in Latin America noted that his company's main problem is lawyers,<sup>174</sup> explaining that "attorneys don't think the way other people think."<sup>175</sup> Venezuelan lawyers surveyed

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<sup>169</sup> Nancy A. Welsh, Looking Down the Road Less Traveled: Challenges to Persuading the Legal Profession to Define Problems More Humanistically, 2008 J. Dispute Resol. 45, 51.

<sup>170</sup> See Philip Gentry, Cultural Blindness in International Clinical Collaboration: The Divide Between Civil and Common Law Cultures and Its Implications for Clinical Legal Education, 17 Clinical L. Rev. 131, 136 (2008). The civil law tradition arises from the articulation of rules by an absolute monarch while the common law tradition arises from constraint of a monarch's powers. See *id.* at 137. This may encourage lawyers trained in the civil law tradition to seek authorization before acting while common law attorneys may tend to take initiatives unless legal rules prohibit them.

<sup>171</sup> For example, many U.S. lawyers have been instrumental in starting and developing mediation friendly approaches to law practice including therapeutic jurisprudence, which encourages laws and practices that have beneficial effects, and collaborative law, which encourages lawyers to agree to represent clients only in negotiations and mediations in an effort to avoid the harmful effects of threatening and using litigation. Leonard L. Riskin, The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and their Clients, 7 Harv. Negotiation L. Rev. 1, 19-20 (2002) ([hereafter Contemplative Lawyer]).

<sup>172</sup> Gold, *supra* note 29, at 295; Chris Guthrie, The Lawyer's Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative Mediation and Lawyering, 6 Harv. Negot. L. Rev. 145, 164 (2001).

<sup>173</sup> Guthrie, *supra* note 172, at 155; Leonard L. Riskin, Mediation and Lawyers, 43 Ohio St. L. J. 29, 43-44(1982). Trials have defined what it means to be a lawyer in legal culture and popular imagination for centuries. Robert Rubinson, Client Counseling, Mediation, and Alternate Narratives of Dispute Resolution, 10 Clinical L. Rev. 833, 834 (2004).

<sup>174</sup> F. Peter Phillips, Exploratory Meeting on Commercial Mediation in Latin America, [http://www.cpradr.org/practice\\_areas/cpr\\_around\\_the\\_world/the\\_Latin\\_America\\_Project](http://www.cpradr.org/practice_areas/cpr_around_the_world/the_Latin_America_Project) (2005) (hereafter Commercial Mediation in Latin America).

<sup>175</sup> *Id.*

preferred adjudicating to resolve commercial disputes.<sup>176</sup> An examination of what Chilean lawyers do listed advocating or defending legal positions before courts or administrative bodies as their most important role.<sup>177</sup> Civil lawyers view themselves primarily as advocates in adjudication.<sup>178</sup> Historically, this strong attachment to defining their role as adjudicatory advocacy has constrained expanding their activities as counselors and allowed competitive, legal-related occupations to perform much of this activity.<sup>179</sup>

Sharing this strong legal cultural tradition influences selective perception by U.S. and Latin American lawyers. Lawyers practicing in both systems tend to perceive through law-based, rights-oriented lenses.<sup>180</sup> U.S. lawyers are more likely than the general population to gather information using general standards and rules.<sup>181</sup> Applicable law and the facts necessary to prove or avoid rights and remedies claims powerfully influences lawyers when gathering and giving information during client conversations.<sup>182</sup> Lawyers anchor their analysis to perceiving potential adjudicatory application of legal doctrines, standards, and rules.<sup>183</sup> Latin American lawyers routinely display similar selective perceptual tendencies. A Chilean scholar summarized the most important law practice habits, skills, and abilities for Chilean lawyers as identifying relevant facts in situations and linking them to appropriate legal sources.<sup>184</sup>

Basing perception on law and legal rules helps U.S. and Latin American lawyers translate complex, multi-factor situations into manageable frames for adjudicatory resolution.<sup>185</sup> While valuable, this perceptual process is selective because it necessarily abstracts and reduces complexity.<sup>186</sup> Using this selective perception to assess commercial disputes and options for resolving them, lawyers identify legally authorized causes of actions, legal and factual elements which substantiate or refute these rights claims and defenses, key proof issues, important witnesses, essential documents, and monetary damage items.<sup>187</sup> This selective perception usually

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<sup>176</sup> Manuel Gomez, Dispute Resolution in Venezuela, Newsletter of the Gould Center for Conflict Resolution Programs 5 (Spring 2004).

<sup>177</sup> Richard J. Wilson, Three Law School Clinics in Chile, 1970-2000: Innovation, Resistance, and Conformity in the Global South, 8 Clinical L. Rev. 515, 575 (2002).

<sup>178</sup> The Civil Law World, *supra* note 164, at 23.

<sup>179</sup> *Id.* at 27.

<sup>180</sup> Guthrie, *supra* note 172, at 160. These learned basic knowledge structures, or schemas, define expectations about how to practice law, interview clients, and resolve commercial disputes. Sternlight & Robbennolt, *supra* note 104, at 451-52. They focus information gathering and facilitate lawyers' abilities to form legal inferences and make case analysis assessments quickly. *Id.*

<sup>181</sup> Welsh, *supra* note 169, at 50.

<sup>182</sup> David A. Binder, et al., Lawyers as Counselors: A Client-Centered Approach 145-57 (1991) (describing how lawyers should use potentially applicable law to guide information gathering during interviews).

<sup>183</sup> Welsh, *supra* note 169, at 51.

<sup>184</sup> Wilson, *supra* note 177, at 575-76.

<sup>185</sup> Guthrie, *supra* note 172, at 158.

<sup>186</sup> *Id.* at 158.

<sup>187</sup> *Id.* at 174-75; Contemplative Lawyer, *supra* note 171, at 16.

excludes business interest-based factors, relational issues, and non-monetary considerations.<sup>188</sup> It also typically ignores reorienting parties to each other, satisfying emotional interests, and responding to yearnings for respect, affinity, and autonomy.<sup>189</sup>

Other legal cultural traditions influence choosing adjudication over mediation. For example, U.S. and Latin American lawyers share legal cultural influences that emphasize traditional, conservative options and do not easily embrace change.<sup>190</sup> Given mediation's newness in commercial and litigation contexts, these tendencies may encourage reliance on adjudication.<sup>191</sup> A human tendency to rely on familiar, traditional approaches is a status quo bias,<sup>192</sup> and its influence is heightened by legal culture in both common law and civil legal systems.

Creating resistance to mediating commercial disputes despite its advantages over adjudication in many situations, Latin American lawyers frequently demonstrate wariness of new approaches and resistance to change traditional methods.<sup>193</sup> Fearing surprises, many prefer familiar approaches to new ones.<sup>194</sup> In addition, reliance on the importance of external, authority figures, such as judges or arbitrators, constitutes a significant aspect of civilian legal culture.<sup>195</sup>

Designed to promote orderly societies, both common and civil law systems have evolved formal adjudication approaches and created rules to structure dispute resolution within them.<sup>196</sup> These orderly structures and formal rules attract U.S. and Latin American lawyers to adjudicating commercial disputes.<sup>197</sup> Although lawyers play different roles in common and civil law adjudicatory systems, the structures in all approaches for obtaining third party decisions and rules regarding what they may and may not do are clear and usually linear. They are imposed by legislation and judicial rules.<sup>198</sup>

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<sup>188</sup> See *Contemplative lawyer*, supra note 171, at 16.

<sup>189</sup> Guthrie, supra note 172, at 164, 174-75.

<sup>190</sup> *Id.* at 178 (arguing that lawyers are viewed by themselves and by others as conservative, risk averse, tradition-bound, and wedded to legalistic range of dispute resolving strategies).

<sup>191</sup> Florida lawyers did not embrace mediation easily and advise their clients to use it readily when courts began ordering it broadly across their non-criminal dockets in 1987. *Mediation in Costa Rica*, supra note 152, at 11. Lawyers also are not as likely as other professions to engage “in divergent thinking during which a variety of potential solutions are generated before any are critically evaluated.” Guthrie, supra note 172, at 178.

<sup>192</sup> *Can We Talk*, supra note 19, at 1271; see Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 *Vand. L. Rev.* 1583, 1585 (1998).

<sup>193</sup> *Mediation in Latin America*, supra note 2, at 428-29.

<sup>194</sup> *Id.* at 429.

<sup>195</sup> See Gentry, supra note 170, at 149.

<sup>196</sup> Scott Dodson, *The Challenge of Comparative Civil Procedure*, 60 *Alabama L. Rev.* 133, 150 (2008) (all nations create procedural systems seeking “fair, orderly, expedient, cost-effective” administration of litigation).

<sup>197</sup> Lipsky & Seeber, supra note 22, at 145-46. The lack of clear legal rules was listed by 28% of 606 respondents as a barrier to the use of commercial mediation. *Id.* at 149. A general counsel for a U.S. public utility described this influence stating: “Cost isn’t the issue—it’s the lack of rules. Litigation may be expensive, but it does have rules.” *Id.* at 146.

<sup>198</sup> See *Mediation in Latin America*, supra note 2, at 419.

Mediation, however, offers an inherently variable, non-linear process aimed at facilitating a complex, multi-layered negotiation between lawyers and commercial clients. It typically follows no legislatively or judicially proscribed procedures.<sup>199</sup> Mediation uses informal norms, avoids rigid structural rules, anticipates ambiguities, tolerates differences, and encourages non-linear outcomes.<sup>200</sup> As a result, mediations are structurally flexible and differ significantly from the formality usually present in U.S. and Latin American judicial systems.<sup>201</sup> Mediation's informal, flexible, less structured approach often clashes with the order- and rule-seeking legal cultural influences U.S. and Latin American lawyers encounter.<sup>202</sup>

U.S. and Latin American lawyers also share legal education experiences that emphasize learning law, legal rules, and adjudicatory contexts far more than developing interest-based negotiation and problem solving behavioral skills. Despite different approaches to developing and learning law and legal rules,<sup>203</sup> most legal educational efforts in both systems primarily, and sometimes exclusively, require learning doctrines, principles, and rules. In US common law-based educational experiences, most of this learning occurs in adjudicatory contexts involving interactive classroom discussions deconstructing written opinions written by appellate courts reviewing trial litigation.<sup>204</sup> Latin American civil law educational systems often confront large class enrollments and usually emphasize lecture approaches focused on code provisions and authorized academic commentaries.<sup>205</sup> Courses reviewing how judicial adjudication systems work are often required in both systems. This curricular emphasis communicates explicit and implicit messages about dispute resolution that students assimilate, believe, and follow when they practice. Consequently, these similar educational efforts send strong cultural messages that adjudicating should resolve commercial disputes because this applies code or common law legal principles.

Although no comparable data was found regarding Latin American attorneys, U.S. lawyers bring personality tendencies that enhance acceptance of the messages to approach

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<sup>199</sup> Id.

<sup>200</sup> Gold, *supra* note 29, at 314; Millhauser, *supra* note 159, at 190.

<sup>201</sup> Mediation in Latin America, *supra* note 2, at 419.

<sup>202</sup> See Millhauser, *supra* note 159, at 190 ((arguing that mediation's flexibility and minimal structure can be a "nightmare" for those who are more rule bound).

<sup>203</sup> Gentry, *supra* note 170, at 136; Wilson, *supra* note 177, at 137-39.

<sup>204</sup> See Roy Stuckey, et al., *Best Practices for Legal Education: A Vision and a Road Map* 132, 141 (2007)(hereafter *Best Practices*) (arguing American legal education should reduce its often near-exclusive reliance of the case and so-called Socratic method); William M. Sullivan, et al., *Educating Lawyers: Preparation for the Profession of Law* 76 (2007) (reviewing data suggesting that case-dialogue teaching is "not seen by recent law graduates as particularly helpful in enabling them to move from school to professional practice").

<sup>205</sup> Gentry, *supra* note 170, at 139-41 (noting that interactive methods are often used in newer, private universities which have smaller class sizes); Monica Pinto, *Developments in Latin American Legal Education*, 21 *Penn. St. Int'l L. Rev.* 61, 62 (2002) (Latin American law schools generally follow the European model of large lecture-based classes).

persons and problems in abstract, analytical ways that their legal education promotes.<sup>206</sup> Ninety percent of U.S. lawyers are left brain dominant which indicates an analytical orientation.<sup>207</sup> Brain researchers often use lawyers when they seek to measure an occupational group that is analytical in its preferred modes of perceiving, deciding, and acting.<sup>208</sup> Use of the Myers-Briggs Type Indicator, an assessment instrument that measures preferences for exercising aspects of perception and judgment, shows that U.S. lawyers are far more likely to make decisions analytically, objectively, and impersonally than the general American population.<sup>209</sup> These tendencies further reinforce win-lose biases and inclinations to recommend adjudication as the logical way to use impersonal, objective actions to win disputes.<sup>210</sup>

The dramatic lack of opportunities provided by U.S. and Latin American legal education to learn skills and values beyond the analytical tasks involved in applying code and other legal principles constitutes another cultural similarity. Nine percent of total instructional time in U.S. law schools is devoted to instruction and practice opportunities in interest-based negotiating, mediation practice and advocacy, interviewing, counseling, and clinics where students serve actual clients with real problems.<sup>211</sup> Ninety-one percent is devoted to learning law, adjudicatory procedures, and rule-based advocacy skills. Elective courses teaching adjudication, primarily litigation, skills and values, comprise the largest number of professional skills offered by U.S. law schools,<sup>212</sup> and are elected by a majority of U.S. law students.<sup>213</sup> This instruction, along with the extensive interactive coverage of appellate opinions in most of the remaining curriculum, ensures that U.S. law students receive ample education in how to argue, persuade, and apply legal rules in adjudicatory situations.<sup>214</sup>

Although virtually all U.S. law schools now offer at least one course teaching interest-based negotiation or mediation or both,<sup>215</sup> these elective courses necessarily limit enrollment to permit valuable performance-based learning approaches. Remarkably resistant to fundamental

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<sup>206</sup> Guthrie, *supra* note 171, at 156.

<sup>207</sup> *Id.* One U.S. lawyer-mediator described legal education as a process where the left brain circles around the right brain and then eats it. David A. Hoffman, *Paradoxes of Mediation*, *Disp. Resol. Magazine* 23 (Fall 2002). Up to a point, there is some truth to the popular generalization that a human brain features an analytical, verbal left hemisphere and an intuitive, creative right hemisphere. Gallagher, *supra* note 101, at 71. Recent neuroscience research, however, suggests that difficult tasks require involvement of both hemispheres and distinctions must be drawn between where within hemispheres activities relating to particular functions occur. *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> Guthrie, *supra* note 171, at 157; see Larry Richard, *The Lawyer Types*, 79 *A.B.A.J.* 74, 76 (July 1993).

<sup>210</sup> See Peters, *supra* note 88, at 52.

<sup>211</sup> Section of Legal Educ. & Admissions to the Bar, ABA, *Legal Education and Professional Development—An Educational Continuum* 239-41 (1992) (Report of the Task Force on Law Schools and the Profession: *Narrowing the Gap*) (hereafter *MacCrate Report*).

<sup>212</sup> *Id.* at 257-58.

<sup>213</sup> *Id.* at 240 (an estimated 58% of U.S. law students enroll in litigation skills courses).

<sup>214</sup> See Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 *S. Tex. L. Rev.* 407, 427 (1997).

<sup>215</sup> Welsh, *supra* note 169, at 49.

change,<sup>216</sup> U.S. law schools generally do not provide adequate opportunities for their students to learn and practice skilled actions in these non-adjudicative tasks.<sup>217</sup> Despite recommendations from recent, prominent examinations of U.S. legal education for more curricular attention to these tasks,<sup>218</sup> on average, seventy-three percent of U.S. law students receive no learning opportunities in courses emphasizing the skills and values needed to negotiate or represent clients in mediation effectively.<sup>219</sup>

Even though repeated studies show that practicing success correlates more with relationship skills than it does with substantive legal knowledge,<sup>220</sup> U.S. law students receive little or no instruction in identifying and responding to human emotions effectively, essential tasks in negotiating,<sup>221</sup> mediating,<sup>222</sup> interviewing, and helping clients make difficult decisions. Studies showing that U.S. lawyers and law students possess relatively underdeveloped emotional and interpersonal capacities and demonstrate low interest in emotions and others' feelings<sup>223</sup> magnify the significance of this curricular failure. U.S. lawyers and law students need training and practice in how to listen, empathize, and navigate through strong emotional moments effectively because they are unlikely to bring well-developed skills at listening actively, attending to verbal and non-verbal cues, and perceiving emotional expressions to their educational and practicing experiences.<sup>224</sup>

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<sup>216</sup> Guthrie, *supra* note 172, at 184.

<sup>217</sup> Finding an imbalance in U.S. legal education concerning instruction in skills need to practice in law offices as well as before and in litigation, the MacCrate Report recommended that law schools develop or expand learning opportunities in these areas. MacCrate Report, *supra* note 211, at 332. A more recent review of U.S. legal education recommends that U.S. law schools should strive to develop competent abilities to resolve legal problems effectively and responsibly, and that this includes attending and responding to emotions skillfully. Best Practices, *supra* note 204, at 60-61.

<sup>218</sup> The MacCrate Report specifically highlighted needs for more educational attention to problem-solving, communication, counseling, and negotiation. MacCrate Report, *supra* note 211, at 330, 332. The Carnegie Report criticizes U.S. legal education for assigning practical legal skills involved in dealing clients to "a subordinate place" and specifically encourages more broadly teaching negotiation skills. Sullivan et al., *supra* note 204, at 7.

<sup>219</sup> Joseph B. Stulberg et al., *Creating and Certifying the Professional Mediator—Education and Credentialing* 28 *Am J. of Trial Advocacy* 75, 78 (2004). This percentage may be declining as the number of negotiation and mediation courses continues to grow. 223 negotiation, mediation, interviewing, and counseling courses were listed in the latest survey of more than 200 ABA accredited law schools. <http://adr.uroregon.edu/aba/classsearch.php> [last visited February 15, 2010). In addition, 50 ADR survey courses and 40 mediation clinics were listed. *Id.* Surprisingly, early research suggests that having taken a negotiation or mediation course in law school is not a statistically significant factor predicting a lawyer's inclination to use mediation to resolve disputes. See Wissler, *supra* note 13, at 224.

<sup>220</sup> Welsh, *supra* note 169, at 56.

<sup>221</sup> Roger Fisher & Daniel Shapiro, *Beyond Reason: Using Emotions As You Negotiate* (2005) (arguing that human emotions are always present during negotiations and describing how positive feelings enhance interest-based negotiating and negative emotions impede it).

<sup>222</sup> Welsh, *supra* note 169, at 53 (arguing lawyers are unlikely to deal with clients and counterparts whose emotions need to be heard, understood, acknowledged, and explored).

<sup>223</sup> Guthrie, *supra* note 172, at 164; Welsh, *supra* note 169, at 50.

<sup>224</sup> Guthrie, *supra* note 172, at 164; Menkel-Meadow, *supra* note 214, at 36.

Most Latin American law schools systems devote an even smaller percentage of their educational resources in this direction. Extensive reliance on top-down, non-interactive lecture approaches create beliefs that experiential learning through role plays, simulations, and supervised actual practice are not important or serious components of legal education.<sup>225</sup> In part because Latin American countries usually offer law as a first degree, ensure their curriculums provide general liberal arts backgrounds initially, and don't emphasize preparing students to practice law because large percentages do not intend to do so, professional skills courses and clinics are generally not offered.<sup>226</sup> Clinics exist in some Latin American countries,<sup>227</sup> and are well established in Chile.<sup>228</sup> Although instruction in interest-based negotiation, interviewing, and counseling occurs in classroom components of these clinics,<sup>229</sup> few separate courses providing learning opportunities in these non-adjudicatory approaches exist in Latin American legal education.<sup>230</sup>

This shared educational deficiency contributes to U.S. and Latin American lawyers' resistance to mediate commercial disputes. While mediating involves using knowledge of applicable laws and adjudicatory procedures to analyze cases and predict outcomes, mediation also requires skilled performance of many other, different tasks including emotional awareness and responsiveness. Many, if not most, U.S. and Latin American lawyers find that representing clients before and during mediation effectively challenges them to perform entirely different tasks than they use when adjudicating.<sup>231</sup> Many have had little experience, education, or practice in performing these tasks skillfully.<sup>232</sup> Many find it difficult to adapt their analytic and win-lose action tendencies to advocate for agreements rather than victories.<sup>233</sup> This often produces counterproductive mediation actions that ignore or respond ineffectively to emotions, jealousy

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<sup>225</sup> Alain Lempereur, *Negotiation and Mediation in France: The Challenge of Skill-Based Learning and Interdisciplinary Research in Legal Education*, 3 *Harv. Negotiation L. Rev.* 151, 164 (1998).

<sup>226</sup> Drumbel, *supra* note 1, at 1079-80; but see Pinto, *supra* note 205, at 65 (explaining that the University of Buenos Aires School of Law offers a first cycle of law study designed to provide learning and teaching activities promoting "reasoning, legal reading, critical analysis for a legal standpoint as well as an understanding of other perspectives such as finding a solution or [achieving] an alternative dispute resolution method").

<sup>227</sup> *Id.* at 1080.

<sup>228</sup> Wilson, *supra* note 177, at 336-56.

<sup>229</sup> *Id.* at 541, 547, 566-67.

<sup>230</sup> See Drumbel, *supra* note 1, at 1103 (recommending curricular approaches in both the US and Latin American countries to approaches and attitudes of civil and common law negotiation and mediation).

<sup>231</sup> Int'l Inst. For Conflict Prevention & Resolution, *How Business Conflict Resolution Is Being Practiced in China and Europe*, 23 *Alternatives to High Cost Litig.* 148, 149 (2005) (quoting a British barrister who noted that for years he had been paid to disagree and suddenly he's expected to help clients and counterparts agree).

<sup>232</sup> Legal, Commercial, and Cultural Obstacles to Mediation Within Europe, 23 *Alternatives to High Cost Litig.* 98, 99 (2005) (Italian lawyers do not consider negotiation as something to be learned and are trained in litigation, not negotiation, practices).

<sup>233</sup> See James C. Freund, *Bridging Troubled Waters: Negotiating Disputes*, *Litig.*, Winter 1986, at 43-44 (arguing that searching for agreements is "a hard road to travel without running the risk of being seen as a softy who is reluctant to fight and ready to give away the store"); Sternlight, *supra* note 138 at 223-24 (suggesting that lawyers' "cognitive characteristics do not necessarily suit them well to engage in problem-solving" negotiation).

guard information against even confidential disclosure in private sessions, seek to maximize gain exclusively, resist broadening issues and perspectives, and criticize excessively.<sup>234</sup>

## B. Influences from Legal Cultural Differences

Moving from legal cultural similarities to differences, identifying factors that influence lawyers' resistance to mediate commercial disputes gets harder for several reasons. Latin American civil systems differ in many respects from European<sup>235</sup> and Asian counterparts,<sup>236</sup> and variations exist within individual Latin American countries.<sup>237</sup> Moreover, how common and civil system attorneys practice differently outside adjudication contexts has received little research attention,<sup>238</sup> and their attitudes and actions regarding recommending mediating commercial disputes has received virtually none. This is partially explained by mediation's recent arrival in civil law countries generally and in Latin America particularly.<sup>239</sup>

The absence of comparative research also stems from the fact that many common and civil law differences flow from variations in how law is created, understood, and applied. These differences have little influence on mediating which pursues outcomes independent of law and legal doctrines. For example, common law lawyers allegedly approach law application challenges pragmatically, seek ways to work around legal rules, and develop innovative, alternative arguments for accomplishing client objectives in the face of apparent legal obstacles.<sup>240</sup> Civil lawyers, on the other hand, allegedly approach law application challenges theoretically, focus on finding code-based answers, and struggle to find creative, alternative arguments that circumvent apparent legal roadblocks.<sup>241</sup> Legal arguments in civil system courts allegedly tend toward broad assertions that do not focus on key evidential and other details while common law court arguments tend to exploit specific facts and testimonial excerpts.<sup>242</sup> Mediating, however, does not involve applying law and making legal arguments. Even if these

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<sup>234</sup> Menkel-Meadow, *supra* note 214, at 427; Sternlight, *supra* note 138, at 324.

<sup>235</sup> Gentry, *supra* note 170, at 134.

<sup>236</sup> See Hal Movius, et al., *Tailoring the Mutual Gains Approach for Negotiations with Partners in Japan, China, and Korea*, 22 *Negot. J.* 389 (2006).

<sup>237</sup> Leonard L. Cavise, *The Transition from the Inquisitorial to the Accusatorial System of Trial Procedure: Why Some Latin American Lawyers Hesitate*, 55 *Wayne L. Rev.* 785, 795 (2007) ("the inquisitorial model as adapted to the various Latin systems retained the fundamental European characteristics but with a number of culturally or politically dictated modifications in each Latin American national system"); Gentry, *supra* note 170, at 144 (public interest litigation or cause lawyering does not exist in Mexico yet is found in Argentina, Brazil, and Columbia); Drumbel, *supra* note 1, at 1063 (Unlike many other Latin American countries, Mexico has several important codifications in the private sphere).

<sup>238</sup> See Nadja Alexander, *What's Law Got To Do With It? Mapping Modern Mediation Movements in Civil and Common Law Jurisdictions*, 13 *Bond L. Rev.* 335, 339-40 (2001); Drumbel, *supra* note 1 at 1056-57.

<sup>239</sup> Alexander, *supra* note 238, at 339.

<sup>240</sup> See *id.* at 356.

<sup>241</sup> See *id.*

<sup>242</sup> Cavise, *supra* note 237, at 810.

broad stereotypes have any validity, they exert virtually no influence on the widespread resistance to mediating commercial disputes displayed by both common law and civil system lawyers.

Although many identifiable practicing differences exist between how common and civil law system lawyers act in adjudication, the influence of these differences on resistance to mediating diminishes because mediation usually requires few tasks that attorneys perform while adjudicating. Lawyers typically perform fewer activities in inquisitorial civil law systems where judges control adjudication from beginning to end.<sup>243</sup> Judges, not lawyers, decide what evidence is necessary, what documents should be presented, what lay and expert witnesses need to be examined, whether oral testimony is needed or written submissions suffice, and they conduct oral examinations subject to supplementation by attorneys.<sup>244</sup> U.S. lawyers, in contrast, decide what witnesses to call and evidence to introduce, base proof extensively on oral testimony that they adduce either before or at trial, determine whether to retain and use expert witnesses, participate in jury selection, and engage in extensive pre-trial and trial motion advocacy.<sup>245</sup>

Efforts underway in many Latin American countries to move their criminal law trial procedure from civil system inquisitorial to common law accusatory have generated substantial resistance and reluctance among many lawyers.<sup>246</sup> These changes, however, may not quickly affect non-criminal adjudicatory systems used in commercial dispute resolution. Moreover, pre-trial discovery of testimony, documents, and other physical evidence seldom exists in civil law countries while it comprises a major component of U.S. common law adjudication.

Mediation removes formal persuasive arguments directed toward decision-makers from the resolution process and avoids extensive use of documents, evidentiary presentations, and examinations of lay and expert witnesses. Although systemic limits on actions lawyers perform in civil system adjudication might lessen resistance to mediation for civil lawyers, they do not appear to have this impact. No evidence suggests that mediation attracts civil system lawyers as a way to escape their more limited adjudicative roles as compared to those performed by common law attorneys. Nor does evidence suggest that U.S. common law attorneys' fact-oriented, client and witness-based litigation experiences influence them to prefer mediating over adjudicating commercial disputes.

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<sup>243</sup> Judd Epstein, *The Use of Comparative Law in Commercial International Arbitration and Commercial Mediation*, 75 *Tul. L. Rev.* 913, 197 (2001).

<sup>244</sup> Gentry, *supra* note 170, at 142.

<sup>245</sup> *Id.* at 142.

<sup>246</sup> Cavise, *supra* note 237, at 787.

Economic considerations significantly influence lawyer resistance to mediating. Some U.S. lawyers fear that mediating brings economic harm.<sup>247</sup> Helping clients resolve commercial disputes provides profitable activity for U.S. and Latin American lawyers who are not full-time employees of the companies involved.<sup>248</sup> Absent disputes which facilitate charging outcome percentages as contingent fees,<sup>249</sup> most U.S. lawyers bill their commercial clients by the hour for dispute resolution work.

Adjudicating requires tasks emphasized by lawyers' experience and education.<sup>250</sup> In the U.S. common law system these tasks often include time consuming and lucrative pre-trial discovery, pre-trial motion advocacy and defense, lay and expert witness preparation and examination, and evidence gathering, preparation, and presentation.<sup>251</sup> U.S. executives complain that hourly fee billing approaches create disincentives for lawyers' to mediate.<sup>252</sup> Many also suggest that this supplies a significant reason why more commercial disputes are not mediated.<sup>253</sup>

A recent U.S. study suggests that mediating frequently reduces the amount of time lawsuits take to resolve. Evaluating fifteen thousand non-criminal, non-commercial lawsuits handled by Assistant U.S. Attorneys showed that using mediation saved an average of eighty-eight lawyer hours per case.<sup>254</sup> Although mediation often appears to reduce hours spent by saving time, law firm revenues for helping commercial clients resolve disputes through mediating do not necessarily have to diminish as a result. Using ADR (alternative dispute resolution) by mediating, usually ADR's most effective form, does not need to connote an alarming drop in revenue for attorneys. Lawyers can and should bill for time spent performing the important tasks involved in helping clients prepare for and participate in mediation.<sup>255</sup> In addition, lawyers may use value-based and similar bonus approaches that reward them for

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<sup>247</sup> Twenty-five percent of lawyers agreed that increasing mediation would decrease their personal compensation while 51% disagreed. Lande, *supra* note 12, at 179-80. Economists recognize that lawyers who are paid by the hour have short term interests in prolonging disputes even if longer term interests in retaining future business or gaining referrals from clients point the other way. Sternlight, *supra* note 138, at 320.

<sup>248</sup> Can We Talk, *supra* note 19, at 1295-96; Yves Dezalay & Bryant G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* 50-51 (1996).

<sup>249</sup> Most often one third of amounts settled before beginning litigation and 40% afterwards. E.g., Fla. Rule Professional Conduct 4-1.5 (setting these amounts as the upper limits of what meets the required standards that fees must be reasonable).

<sup>250</sup> Can We Talk, *supra* note 19 at 1296.

<sup>251</sup> See Stewart Levin, *Breaking Down Costs: What are You Losing by Not Using ADR*, 19 *Alternatives to High cost Litig.* 235 (2001). In 2000 an estimated \$400 billion in litigation costs were incurred in the more than 22 million cases that were filed in the U.S. *Id.*

<sup>252</sup> McEwen, *supra* note 30, at 11 (quoting general counsel who believes hourly billing is blocks early, inexpensive settlements and encourages lawyers to do things slowly).

<sup>253</sup> *Business Mediation, from All Points of View*, 24 *Alternatives to High Cost Litig.* 101, 104 (2006).

<sup>254</sup> Lisa Blomgren Binham, et al., *Dispute Resolution and the Vanishing Trial: Comparing Federal Government Litigation and ADR Outcomes*, 24 *Ohio St. J. on Disp. Resol.* 225, 252 (2009).

<sup>255</sup> Can We Talk, *supra* note 19, at 1298.

achieving timely, effective, high quality outcomes in fixed price, retainer, and hourly billing contexts.<sup>256</sup>

Similar economic concerns influence civil system lawyers even though they may not depend as much on hourly billing.<sup>257</sup> Latin American attorneys express concerns that mediation brings economic disincentives and that adjudicating pays but mediating does not.<sup>258</sup> An EU mediator noted that the primary challenge to implementing the EU cross-border mediation directive is to make mediating financially attractive for lawyers, not clients.<sup>259</sup> Fear of lost income from more mediation and less litigation has generated lawyer resistance in Denmark<sup>260</sup> and Scotland, a mixed civil and common law country.<sup>261</sup> An instinct to preserve their dominant roles in dispute resolution and avoid losing income from helping clients resolve commercial disputes probably explains lawyer resistance to greater use of mediation in Italy.<sup>262</sup> When designing mediation systems, legislators and judges must avoid creating direct economic disincentives to mediating commercial disputes.<sup>263</sup>

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<sup>256</sup> See Nancy Nelson & Thomas J. Stipanowich, *Commercial Mediation in Europe: Better Solutions for Business 9* (2004) (hereafter *European Commercial Mediation*) (arguing that to retain increasingly cost-conscious clients, and win new ones, lawyers need to prove themselves as skilled early dispute resolvers and solution providers as well as good adjudication advocates); Update: *How Value Billing Helps both the Client and the Law firm*, 28 *Alternatives to High Cost Litig.* 1, 7 (2010) (describing value-based approach that enhance budgeting and delivering cost effective, right-sized, high quality legal services).

<sup>257</sup> See Richard L. Abel, *Comparative Sociology of Legal Professions* 80, 110, in *Lawyers in Society: Comparative Theories*, Richard L. Abel & Philip S. Lewis, eds., 1989) (noting that mandatory fees are fixed by state in all matters in Germany, advisory fee schedules are set by the state in Italy, and advisory fee schedules are established by the legal profession in Norway, Brazil, France, Spain, and Japan).

<sup>258</sup> *Commercial Mediation in Latin America*, supra note 174. The increased lawyer activity needed to gather information preparing for mediation that requires consent to succeed fully both stretches civil system lawyers to perform tasks they are not accustomed to and creates risks that their clients might not understand why they need to pay for this work.

<sup>259</sup> *EU Backs Cross-Border Mediation*, supra note 26, at 122-23.

<sup>260</sup> Vibeke Vindelov, *Mediation in Danish Law: In Retrospect and Perspective*, in *Global Mediation Trends*, supra note 25, at 123, 131.

<sup>261</sup> Margaret L. Ross, *Mediation in Scotland: An Elusive Opportunity*, in *Global Mediation Trends*, supra note 25, at 305, 329.

<sup>262</sup> De Palo & Harley, supra note 61, at 476. The Italian fee structure, which is based primarily on the number of briefs and hearings, is a further incentive to not use mediation. Giuseppe De Palo & Luigi Cominelli, *Mediation in Italy: Waiting for the Big Bang?*, in *Global Mediation Trends*, supra note 25, at 259, 262.

<sup>263</sup> For example, Germany used a system where legal costs insurance paid for adjudication but not mediation fees leaving this expense entirely on clients and discouraging them and their lawyers from mediating. Alexander, supra note 237, at 357. Lawyer-mediators in a German mandatory mediation project complained about low reimbursement they received under statutory rates, nothing they could not afford to spend more than 60 minutes even though agreements would have been much more likely with a longer time period. Nadja Alexander et al., *Mediation in Germany: The Long and Winding Road*, *Global Mediation Trends*, supra note 25, at 223, 247. Similarly, Poland's court connected mediation scheme limits mediator compensation to an amount that discourages mediation of significant commercial disputes that necessarily require more than a few hours. See Sylwester Pieckowski, *Using Mediation in Poland to Resolve Civil Disputes: A Short Assessment of Mediation Usage from 2005-2008*, 64 *Dispute Resolution Magazine* 84 (2009).

Demonstrating that legal system differences do not affect resistance to mediating, these economic concerns influence lawyers in both systems even though adjudicatory risks frequently differ in each. Risks of large negative outcomes in civil system adjudication are usually not as strong as they are in U.S. courts. The absence of juries removes much of the frightening, risky unpredictability that exists in U.S. common law litigation.<sup>264</sup> Predicting outcomes from a single, legally trained decision-maker is usually easier than predicting what a group of non-legally sophisticated people will do. Damages in civil law system adjudication are generally lower than similar awards in civil adjudication.<sup>265</sup> Transactional costs are usually smaller in civil countries because of less pre-trial civil discovery costs and other attorney fee expenditures. A civil system tradition requiring losing parties to pay prevailing litigant's legal fees also often deters excessive transactional costs.

As this analysis demonstrates, legal cultural differences between U.S. common and Latin American civil lawyers exert slight influence on attorneys' resistance to mediate commercial cases found in both systems.<sup>266</sup> These legal cultural differences apply primarily to adjudication, particularly litigation. Substantial differences in litigating procedures between common law adversarial and civil system inquisitorial traditions generate complications stemming from different attorney, expert, and judicial roles, varying methods of presenting evidence, and contrasting values accorded to oral testimony and previous judicial decisions.<sup>267</sup> These differences help explain why many cross border controversies involving disputants from common and civil law systems select arbitration rather than litigation.<sup>268</sup> Mediation's different assumptions, goals, and processes, however, transcend different legal systems and the legal cultural variations they generate.<sup>269</sup> Its potential advantages warrant more consideration that lawyers in both systems often give it, and this article concludes by analyzing how attorneys can ensure that this assessment occurs in all commercial disputes.

## **V. CONCLUSION: IDENTIFY, EXPLAIN, AND ASSESS MEDIATING IN EARLY STAGES OF COMMERCIAL DISPUTES**

This large menu of emotional-brain and neural short-cut biases, combined with powerful legal cultural influences largely unaffected by common and civil law system differences, explains why U.S. and Latin American lawyers resist mediating commercial disputes. This article concludes with reasons why more identifying, explaining, and assessing the option of

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<sup>264</sup> Dodson, *supra* note 196, at 141 (civil law countries have not had juries in non-criminal matters for centuries).

<sup>265</sup> See *id.* at 146 (few countries permit the same individualized focus and wide variation that U.S. damage verdicts allow and most civil law countries prohibit punitive damages while U.S. law continues to permit).

<sup>266</sup> Christine Cervenak, et al., *Leaping the Bar: Overcoming Legal Opposition to ADR in the Developing World*, 4 *Disp. Resol. Mag.* 6 (1998) (Legal cultural factors whether arising out of civil law or common law systems, as well as fears of negative pocketbook effects, often predispose lawyers to oppose mediation).

<sup>267</sup> *Can We Talk*, *supra* note 19, at 1256.

<sup>268</sup> *Id.* at 1255-58.

<sup>269</sup> *Global Trends in Mediation*, *supra* note 25, at 2; see Cervenak, et al, *supra* note 266, at 6.

mediating than typically occurs makes sense. Doing this helps commercial lawyers and clients counter all of the biases and cultural influences previously described. It ensures that lawyers and their clients use their brain's prefrontal cortex to subject this important decision to slow, conscious deliberation.<sup>270</sup> It also helps manage escalating dispute resolution budgets, and often produces faster, more business interest-centered outcomes.

Overcoming mediation resistance begins with identifying that mediating exists as an optional method for resolving commercial disputes. Because of long-standing traditions to view adjudication as simply what is done when participants cannot negotiate commercial disputes successfully, this initial step of consciously making a decision about mediating often disappears.<sup>271</sup> Lawyers, executives and managers assume that they have no other choice than to adjudicate.<sup>272</sup> Failing to appreciate fully the ways mediating differs from and is superior to unaided face-to-face negotiation,<sup>273</sup> they assume that disputes cannot resolve consensually because they have already tried to negotiate them without success. They also often fail to grasp how mediating creates opportunities to achieve many different goals and provides process and procedural tools not offered by adjudication.<sup>274</sup>

The next step requires lawyers to question these assumptions and restrain their automatic, habitual desires to adjudicate commercial disputes. As this article demonstrates, doing this is neither easy nor common. Lawyers in both systems enjoy monopoly status as persons generally permitted to represent human and entity clients in lawsuits and arbitrations.<sup>275</sup> People like to sell to their strengths and adjudicating allows lawyers to market their primary product lines of knowledge of legal rules, rights, remedies and defenses and abilities to apply this expertise persuading external decision-makers. Adjudication emphasizes issue-oriented dispute resolution which focuses on legal rule connections and applications.<sup>276</sup>

U.S. lawyers enjoy feeling in control and central to the action.<sup>277</sup> As compared to clients, adjudicating lets lawyers exercise control, play dominant roles, and remain central to the

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<sup>270</sup> Leher, *supra* note 90, at 243-50 (proposing five general guidelines to improve decision-making).

<sup>271</sup> European Commercial Mediation, *supra* note 256, at 11.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* These advantages include using confidential caucuses to gather more and better information combating selective perception; defusing strong emotions breaking through partisan perceptions; countering optimistic overconfidence by enhancing realistic forecasts of adjudicatory outcomes enabling better comparisons of them and negotiation proposals; expanding discussion agendas to include business interests muting fixed pie and zero sum assumptions; and helping disputants assess shared interests in controlling resolutions, avoiding loss risks, and saving further transactional costs as ways to confront win-lose biases.

<sup>274</sup> Wayne Brazil Hosting Mediations as a Representative of the System of Civil Justice, 22 *Ohio St. J. on Disp. Resol.* 227, 258.

<sup>275</sup> See Abel, *supra* note 257, at 106.

<sup>276</sup> Eric Ryan, Building the Emotionally Learned Negotiation, 22 *Negot. J.* 209, 222 (2006).

<sup>277</sup> Guthrie, *supra* note 172, at 160 n.84; Welsh, *supra* note 168, at 51.

endeavor until external decision-makers act.<sup>278</sup> Lawyers usually prefer leading to following, and adjudicating requires them to lead as they plead claims and defenses, assemble evidence, and present arguments.<sup>279</sup> Clients usually defer to their lawyer's knowledge and expertise in these realms and focusing interactions on lawyers' expertise lessens attorneys' needs to share agendas with their clients.<sup>280</sup>

Lawyers, like all humans, feel most comfortable doing what they know best<sup>281</sup> and resist performing actions that present more challenge and produce less comfort.<sup>282</sup> Change is never easy and it often generates fears of making mistakes and receiving negative judgments.<sup>283</sup> Lawyers must ensure that they do not reject mediation because it changes resolution process dynamics and gives them less control, centrality, leadership, and opportunity to display legal knowledge-based advocacy. Lawyers must also resist inclinations to avoid mediation because it puts them outside their comfort zone by requiring actions that acknowledge and respond to the complicated, interactive emotional dynamics that arise during dispute resolution.<sup>284</sup>

Mediation reduces lawyer control by substituting a less formal consensual process where clients attend and have opportunities to participate substantially, for more rule-bound adjudication approaches where clients often are not present, do not participate unless testifying, and transfer decision-making to judges, arbitrators, or juries.<sup>285</sup> Mediating anticipates larger roles for clients than they play in adjudicating. Mediating typically requires clients to attend, and provides several opportunities for them to talk and listen in joint sessions when all disputants meet together, and in confidential meetings conducted outside the presence of all or some other participants. Mediating gives commercial clients opportunities to hear counterparts' perspectives directly without distortion from their lawyers, interact directly with counterparts, and make informed comparisons between best mediation options and likely adjudication outcomes.<sup>286</sup>

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<sup>278</sup> Sternlight, *supra* note 138, at 339-45.

<sup>279</sup> Can We Talk, *supra* note 19, at 1296.

<sup>280</sup> For example, U.S. legal ethical standards divide decision-making authority for the means client objectives are pursued. Model Rules of Prof'l Conduct R. 1.2(a) (2002). Clients are expected normally to "defer to the special knowledge and skill" of their lawyers, "particularly with respect to technical, legal, and technical matters." Comment 2. Many attorneys interpret this to encompass the decisions needed to manage adjudication.

<sup>281</sup> Guthrie, *supra* note 172 at 166

<sup>282</sup> Robert C. Bordone et al., *The Next Thirty Years: Directions and Challenges*, in *Dispute Resolution Handbook*, *supra* note 35, at 507, 511.

<sup>283</sup> Marguerite Millhauser, *supra* note 159, at 190.

<sup>284</sup> See Ryan, *supra* note 276 at 213; notes 308-16 *infra* and accompanying text.

<sup>285</sup> See Gentry, *supra* note 170, at 142 (quoting Dutch lawyers who say that in typical civil suits in the Netherlands it is thought to be too expensive to have clients testify so absent significant disagreements, attorneys prepare and submit written summaries of client and witness statements).

<sup>286</sup> Sternlight, *supra* note 138, at 339.

While lawyers typically play central, often leading, roles in the managed discourse that comprises effective mediating,<sup>287</sup> their actions occur in the presence of and in collaboration with representatives of their commercial clients and their counterparts. For example, their analysis of case strengths, weaknesses, and outcome forecasts are typically discussed confidentially yet in their client's presence. Because this presents risks of surfacing evidence gathering and evaluation errors, it often encourages more preparation by lawyers than face-to-face negotiations generate.<sup>288</sup> In addition, mediation lessens lawyer's law-based expertise by integrating consideration of non-monetary and other interests outside legal frames, de-emphasizing determinations about applicable law, and seeking outcomes parties can live with considering costs, benefits, and risks.<sup>289</sup> Mediating generates information for making cost-benefit assessments that commercial clients typically make in other facets of their business operations.<sup>290</sup> Finally, mediating challenges lawyers to navigate emotional dynamics skillfully, managing themselves in the midst of emotional stress while conducting effective professional interactions with others who are often strongly influenced by emotions.<sup>291</sup>

Discussing mediation as a pre-adjudication option counters brain-based and cultural biases and helps lawyers approach the challenging tasks that mediating encompasses. Demonstrating that dispute contexts contain more solution-relevant information than legal analysis identifies, mediating combats selective perception. For example, determining whether to mediate requires identifying and assessing whether significant actual or potential commercial relationships or other business interests exist.<sup>292</sup> Doing this encourages evaluating the importance clients place on publicity, confidentiality, and obtaining relief that adjudication cannot provide such as apologies, modified relations, expedited compliances, licensing agreements, equipment sharing arrangements, barter arrangements, bid invitations, and future references.<sup>293</sup> Doing this also emulates efforts mediators make to shift focus from the parties and their inclinations to maximize gain against each other to solving together the commercial problems disputes present.<sup>294</sup>

Mediating combats fixed pie and zero sum biases by expanding resolution agendas to include these and other types of business and non-monetary interests. Unlike similarly-valued adjudicatory options producing win-lose, everything one gains others lose outcomes; commercial

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<sup>287</sup> Riskin & Welsh, *supra* note 14, at 875 (noting lawyers tend to dominate discussions during court-connected mediations of ordinary non-criminal, non-family disputes in the United States).

<sup>288</sup> See Sternlight, *supra* note 138, at 340.

<sup>289</sup> See Alexander, *supra* note 238, at 356-57.

<sup>290</sup> James C. Freund, *Three's A Crowd: How to Resolve a Knotty Multi-Party Dispute Through Mediation*, 64 *Business Lawyer* 359, 362-63 (2009).

<sup>291</sup> Ryan, *supra* note 276, at 210.

<sup>292</sup> *Screening Device Determines ADR Suitability*, 15 *Alternatives to High Cost Litig.* 7 (1997) (hereafter *Suitability Screening Device*).

<sup>293</sup> *Id.* at 8.

<sup>294</sup> *Mediation in Latin America*, *supra* note 2, at 418.

actors probably value business and non-monetary interests differently, and prioritize them in non-identical ways.<sup>295</sup> These differently valued and prioritized possibilities generate value-creating agreement opportunities by trading relatively lesser for relatively more valued options.<sup>296</sup> Mediating also provides opportunities to broaden understandings of how counterparts view disputes, business interests, potential trades, and the impacts that these perspectives have on monetary remedies that are or might be asserted in adjudication.<sup>297</sup>

Many commercial disputes present situations where considerations external to the monetary claims framed by adjudication primarily drive decisions.<sup>298</sup> Even when assessing just win-lose outcomes on legal claims involving money damages, however, mediating helps lawyers and their commercial clients realize that they lack perfect information upon which to base their case analyses and outcome forecasts.<sup>299</sup> Effective lawyers understand that they do not know or understand everything relevant to analyzing and forecasting adjudication outcomes.<sup>300</sup> They also know that selective and partisan perception lessens their analytic objectivity and increases risks of biased predictions.<sup>301</sup> Mediating creates balanced opportunities for commercial disputants and their lawyers to speak to and learn from each other privately about factors on which case analyses and outcome forecasts are based with assurance that what they say and do will not appear in court testimony or the media.<sup>302</sup>

An additional layer of confidential caucusing allows private meetings with mediators and frequently generates information that would never appear in adjudication but which often proves crucial to resolutions.<sup>303</sup> Confidential caucuses overcome major resolution barriers that flow from strategic approaches to communication generated by adjudicating.<sup>304</sup> Arising from win-

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<sup>295</sup>Expanding resolution agendas to include these specific types of commercial interests encourage trading, the most common approach to creating value in mediation. Don Peters, *When Lawyers Move Their Lips: Attorney Truthfulness in Mediation and a Modest Proposal*, 2007 J. Disp. Resol. 119, 134-35, 137.

<sup>296</sup> *Id.*

<sup>297</sup> An analysis of many years of surveys regarding court-connected mediation in the United States Federal Court for the Northern District of California showed that 62% of lawyers believed mediation had helped parties identify their underlying interests, needs, and priorities beyond their legal positions. Brazil, *supra* note 274, at 253.

<sup>298</sup> *Id.* at 233. Mediating allows disputants to learn that they are better off if they focus virtually all solution-seeking activities on underlying interests, non-monetary values, and longer-range visions. *Id.*

<sup>299</sup> Sternlight, *supra* note 138, at 299. This may challenge some Latin American lawyers who may not have much experience in their litigation systems with developing information regarding their counterparts' case. See Cavise, *supra* note 236, at 806.

<sup>300</sup> Brazil, *supra* note 273, at 232.

<sup>301</sup> *Id.*

<sup>302</sup> European Commercial Mediation in Europe, *supra* note 256, at 14. This privacy protection is typically outlined in agreements to mediate and reinforced by legal rules supporting the confidentiality of mediation generally. *Id.*

<sup>303</sup> *Id.* In a survey of federal mediation in the Northern District of California, thirty-one percent of litigators reported that mediation explored resolutions beyond that which courts could order, and thirty-eight percent said that mediation had clarified, narrowed, or eliminated issues. Brazil, *supra* note 274, at 253.

<sup>304</sup> Sternlight, *supra* note 138, at 335-36. In the California federal district court study, 21 percent of litigants and 22% of their lawyers reported that they had bridged a communication gape during the mediation. Brazil, *supra* note 273 at 252.

lose and loss aversion biases, commercial disputants are reluctant to disclose private information not known to counterparts in order to maximize their gain, increase their leverage, and avoid creating potential leverage against them.<sup>305</sup> With permission, and after disputants have had opportunities to share their perspectives, concerns, and analyses, mediators frequently use this hoarded but often agreement-useful information in indirect, disguised ways by offering hypothetical possibilities or making suggestions.<sup>306</sup>

These enhanced communication channels that are possible in mediation but not in adjudication help commercial decision-makers move their understanding beyond selective perception by becoming more familiar with and realistic regarding dispute facts, case analyses, and outcome forecasts.<sup>307</sup> They help commercial disputants avoid negotiation errors stemming from missing or misunderstanding important facts, legal rules, possible agreement terms, and adjudicatory outcome components.<sup>308</sup>

Mediating often defuses hostility between disputants and combats the distortions caused by partisan perception and biased attribution. Remembering this may help lawyers manage their discomfort with dealing with the fluid emotional dynamics that mediated negotiations often reveal.<sup>309</sup> Negative, hostile emotions influence behaviors, divert attention from resolution, and damage relationships.<sup>310</sup> Positive emotions promote satisfying substantive interests, enhance relationships, and reduce exploitation fears.<sup>311</sup>

Effective mediators seek to establish and maintain positive emotional climates conducive to constructive communication.<sup>312</sup> They frequently respond to core emotional concerns by expressing appreciation, building affiliation, respecting autonomy, and acknowledging status.<sup>313</sup>

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<sup>305</sup> J. Anderson Little, *Making Money Talk: How to Mediate Insured Claims and Other Monetary Disputes* 19-22 (2007).

<sup>306</sup> Hoffman, *supra* note 207, at 25-26. An American Bar Association Section of Dispute Resolution Task Force conducted 10 focus group discussions in 9 U.S. cities and reviewed more than 100 questionnaire responses to compile a Final Report on Improving Mediation Quality. This Report found that 95% of respondents felt it was essential, very important, or important that mediators make suggestions, and 100% welcomed suggestions regarding possible ways to resolve issues. Final Report of ABA Task Force on Improving Mediation Quality 14 (2008) (hereafter Report on Improving Mediation Quality).

<sup>307</sup> Suitability Screening Device, *supra* note 292, at 7.

<sup>308</sup> Brazil, *supra* note 274, at 239. Mediation discourse promotes two simple suggestions offered to help decision-makers: (1) always entertain competing hypotheses, and (2) continually remind yourself of what you don't know. Leher, *supra* note 90, at 247.

<sup>309</sup> Suitability Screening Device, *supra* note 292, at 7 (likelihood that mediator could help defuse hostility between disputants or their lawyers or both is a factor suggesting suitability for mediation).

<sup>310</sup> Fisher & Shapiro, *supra* note 221, at 5, 11-12.

<sup>311</sup> *Id.* at 7-8.

<sup>312</sup> See Ryan, *supra* note 275, at 221. Positive emotions facilitate creative problem solving in negotiation and enhance creativity and rapport. Fisher & Shapiro, *supra* note 221, at 214-15. Good feelings widen perception and helps people think more flexibility, take in situation's larger implications, think more in terms of relationship, and connect more dots. Gallagher, *supra* note 101, at 37.

<sup>313</sup> Fisher & Shapiro, *supra* note 221, at 15-21.

They strive to introduce “light where before there was only heat”<sup>314</sup> by acknowledging strong emotions that disputants often express.<sup>315</sup> This permits participants to express negative emotions, usually in caucus out of the presence of counterparts.<sup>316</sup> Discussing topics triggering strong emotions in private sessions allow full expression without alienating counterparts. These conversations counter biased attribution by disentangling impact from intent.<sup>317</sup> They also often generate useful information that clarifies interests and aids careful analysis of the costs and benefits of mediation alternatives.

Mediating commercial cases combats optimistic overconfidence because it typically encompasses frank, mutual analysis of alternatives to agreeing consensually. Comparing what emerges as the best terms achievable during mediating with these alternatives supplies a core component of commercial dispute mediation.<sup>318</sup> Effective mediators promote the development of greater information regarding mediation alternatives by discussing, usually in caucuses, strengths, weaknesses, gaps, inconsistencies, and vulnerabilities concerning specific dimensions of anticipated mediation options.<sup>319</sup>

Because commercial dispute resolution usually occurs in the shadow of adjudicatory alternatives, much of this conversation concerns specific information regarding case analyses and outcome forecasts. Typically occurring after disputants have presented their views, concerns, and opinions fully, these conversations often begin with discussions of analytic strengths and bases of favorable predictions.<sup>320</sup> Listening carefully, mediators can convert this information to questions to ask counterparts regarding potential vulnerabilities and weaknesses in their legal positions and outcome forecasts.

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<sup>314</sup> European Commercial Mediation, *supra* note 256, at 15.

<sup>315</sup> Acknowledging feelings is usually a pre-requisite to problem-solving. *Difficult Conversations*, *supra* note 115, at 106. Neutral, non-judgmental statements that communicate that listeners hear and understand emotions supply the most effective way to acknowledge feelings. David Binder, et al., *supra* note 182, at 52-61. Doing this signals that speakers’ and their emotions matter. *Difficult Conversations*, *supra* note 117, at 106.

<sup>316</sup> Golann & Folberg, *supra* note 6, at 195 (sometimes simply allowing disputants to vent their feelings privately is enough to clear the air); Amy L. Lieberman, *The A List of Emotions in Mediation: From Anxiety to Agreement*, 61 *Disp. Resol. J.* 46, 48 (2006) (acknowledging strong feels tends to “take some of the juice out of them”).

<sup>317</sup> Russell Korobkin, *Psychological Impediments to Mediation Success: Theory and Practice*, 21 *Ohio St. J. on Disp. Resol.* 281, 304-08 (2006) (hereafter *Psychological Impediments to Mediating*) (describing interventions mediations make to help disputants combat attribution errors); see *Difficult Conversations*, *supra* note 117, at 44, 53-55 (arguing intentions strongly influence judgments humans make of others, and judges others more harshly if they intended to harm than if they did so for other reasons).

<sup>318</sup> Brazil, *supra* note 274, at 239.

<sup>319</sup> Korobkin, *supra* note 111, at 69.

<sup>320</sup> Ninety-five percent of respondents indicated that mediators’ reviewing case strengths and weaknesses is helpful in half or more of the cases they mediated. *Report on Improving Mediation Quality*, *supra* note 306, at 14.

Mediators then tactfully phrase and respectfully ask these questions.<sup>321</sup> Responding to these inquiries permits counterparts to learn and assess these contrasting perspectives. Using questions rather than statements allows mediators to encourage lawyers to articulate responses to inquiries about potential gaps, inconsistencies, and problems.<sup>322</sup> This dialogue allows commercial clients to hear pros and cons of adjudicatory analyses and predictions discussed in non-adversarial, information-oriented rather than persuasion-focused, settings.<sup>323</sup> These discussions often help clients understand why and how they need to adjust their views of adjudicatory outcomes and form more realistic expectations regarding settlement possibilities and proposals.<sup>324</sup>

Finally, mediating counters the perceptual and legal cultural, win-lose biases that influence the strategic ways lawyers typically negotiate money-based issues. Most commercial disputes involve at least some negotiating over money and mediators add considerable value by helping participants deal with optimistically overconfident case analyses and the negative emotions that positional bargaining between differing perspectives frequently generates.<sup>325</sup> Mediating dampens the use and effects of ineffective but common negotiating tactics like unwarranted threats, dangerous bluffs, and premature “final offers.”<sup>326</sup>

Money-based negotiating typically involves multiple rounds of offers and responses as participants move through their negotiation ranges.<sup>327</sup> Attempts to maximize gain and avoid loss influence tendencies to start negotiating with extreme demands reflected in high or low ball offers, often considerably above or below adjudication forecasts,<sup>328</sup> and to stop bargaining before reaching their best numbers.<sup>329</sup> Using skilled listening, questioning, and confidential caucusing, mediators help everyone deal with negative emotions generated by biased attributions that perceive evaluation differences as criticism and strategic negotiating actions as disrespect.<sup>330</sup> They also help participants deal with the escalating impatience and frustration that accompanies

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<sup>321</sup> Ninety-five percent of respondents reported that mediators’ asking pointed questions that raised issues is helpful in half or more of the cases which they mediated. *Id.*

<sup>322</sup> Korobkin, *supra* note 111, at 69. Participating in this discourse might challenge Latin American lawyers who are not accustomed to having real control over the presentation and development of investigation and trial of matters. See Cavise, *supra* note 237, at 790.

<sup>323</sup> International Mediation, *supra* note 4, at 23-24. Commercial clients sometimes complain that their lawyers never discuss case weaknesses and instead focus only on strengths. Stephen P. Younger, *Effective Representation of Corporate Clients in Mediation*, 59 Albany L. Rev. 951, 957 (1996).

<sup>324</sup> Brazil, *supra* note 274, at 232. Gaining clearer understandings of the strengths of each other’s claims often narrows gaps between disputants’ outcome forecasts and encourages settlement. Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 Mich. L. Rev. 107, 128 n.86 (1994).

<sup>325</sup> *Id.* at 233; Little, *supra* note 305, at 85-109.

<sup>326</sup> Freund, *supra* note 290, at 363.

<sup>327</sup> Little, *supra* note 305, at 25-28; see J. Michael Keating, *Mediating in the Dance for Dollars*, 14 *Alternatives to High Cost Litig.* 102, 103 (1996).

<sup>328</sup> Little, *supra* note 305, at 47, 128-29

<sup>329</sup> *Id.* at 30-31.

<sup>330</sup> *Id.* at 86-89.

grudging efforts to move to midpoints between opening proposals. Analyzing and evaluating claims is not easy, and mediating helps lawyers avoid false negotiation failures during this process resulting from guessing incorrectly about what they can achieve, posturing too long, hiding real top or bottom limits too tenaciously, and concluding further movement cannot be made without unacceptable face loss.<sup>331</sup>

Although disputants' best numbers usually do not overlap, mediating helps many commercial disputants find ways to bridge the smaller gaps that usually appear once extensive negotiating identifies viable ranges.<sup>332</sup> Carefully examining estimates regarding all transactional costs of pursuing adjudicatory alternatives, including attorneys fees, court costs, business disruption expenses, lost commercial opportunities, time estimates, collection probabilities, and appellate risks, often helps bridge these gaps.<sup>333</sup> So does analyzing shared interests in ending disputes, avoiding loss risks, and maximizing independent business interests. Mediating helps commercial clients assess carefully whether adjudicating is really necessary and cost beneficial to achieve vindication, secure company reputations, reduce the incidence of future similar or related claims, or obtain decisive legal precedent.<sup>334</sup> Even if agreement does not result, mediating often increases mutual understanding, resolves many issues, and narrows the focus for going forward with either adjudication or later mediation reconvened with different participants.<sup>335</sup>

Globalization, regional economic integration, and increased business activity within the United States and Latin America amplify needs to resolve commercial disputes with greater efficiency. Lawyers in these countries need to develop heightened awareness of adjudication alternatives and the promise they hold to create mutually satisfactory, business interest based resolutions. Pre- or early-adjudication mediation, while not a panacea, supplies a valuable tool that enhances efficient commercial dispute resolution when used more often by lawyers and their business clients.

Mediating builds on to rather than ignores existing lawyer skills needed to analyze fact situations, discern applicable law, and estimate adjudicatory outcomes.<sup>336</sup> Mediating gives lawyers important roles in helping their commercial clients develop, compare, and then choose between accepting the best settlement option obtainable or initiating or continuing

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<sup>331</sup> Brazil, *supra* note 274, at 239-40.

<sup>332</sup> Little, *supra* note 305, at 190-92. Ninety-eight percent of respondents viewed persistence as an essential, very important or important quality in mediators and 93% identified patience in the same way. Report on Improving Mediation Quality, *supra* note 306, at 17. They expressed "dissatisfaction with mediators who threw in the towel when negotiations became difficult." *Id.*

<sup>333</sup> Can We Talk, *supra* note 19 at 1284-86.

<sup>334</sup> Suitability Screening Device, *supra* note 292, at 8. Obtaining a precedent may not be as important in Latin American countries where the value of case precedent may be either non-existent or limited. See Cavise, *supra* note 237, at 794.

<sup>335</sup> European Commercial Mediation, *supra* note 256, at 22.

<sup>336</sup> See Guthrie, *supra* note 172, at 180; Welsh, *supra* note 169, at 52.

adjudication.<sup>337</sup> Mediating also lets lawyers satisfy human impulses for resolution, healing individuals and organizations, and enabling commerce to function more harmoniously and productively.<sup>338</sup>

Humans are profoundly social beings constantly influencing and being influenced by each other. Small scale activities by a few individuals can generate contagious behaviors that cross a tipping point and produce dramatic, immediate changes in social practices.<sup>339</sup> The tipping point for commercial dispute mediation probably occurs when mediating happens so commonly that it becomes the regular option, the default preference unless particular circumstances suggest otherwise.<sup>340</sup> As this analysis demonstrates, lawyers' resistance to mediating commercial disputes has not approached such a tipping point. But if more lawyers identified and surmounted the barriers generating their resistance to mediate, use of this beneficial adjudicatory alternative might approach or even cross this tipping point. Shall we mediate, or tango, or both?

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<sup>337</sup> Lawrence M. Watson, *Initiating the Settlement Process: Ethical Considerations*, in *Dispute Resolution Ethics: A Comprehensive Guide*, 7, 15 (Phyllis Bernard & Bryant Garth eds, 2002).

<sup>338</sup> See Steven Keeva, *Transforming Practices: Finding Joy and Satisfaction in the Legal Life XX* (1999).

<sup>339</sup> See Malcolm Gladwell, *The Tipping Point: How Little Things Can Make a Big Difference* 9 (2002).

<sup>340</sup> Matthias Prause, *The Oxymoron of Measuring the Immeasurable: Potential and Challenges of Determining Mediation Developments in the U.S.*, 13 *Harv. Negot. L. Rev.*, 131, 233-34 (2008). Some signs suggest that movement in this direction is underway. Influential numbers U.S. lawyers handling commercial disputes have recently affirmed their willingness to mediate in ways that explores both adjudication analysis and exploring underlying business interests. Riskin & Welsh, *supra* note 14, at 924.