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A Mediator's Perspective On Dealing With The Intransigent Party

by Marc Goldstein

A not unusual dynamic in the mediation of complex cases is that one party insists, through the course of a full day of mediation or even multiple sessions, that it will not make a material move toward settlement, and that it would rather try the case. And yet the same party expresses willingness to continue the mediation and even to return to further sessions.

The situation presents several concerns for the mediator. One is the possibility that the party taking this position is using the mediation process merely as a vehicle to delay the progress of the case in court or in arbitration (assuming that some stay of proceedings pending mediation is in effect). It is a fair question to raise with that party in private session. However, unless the circumstances are extreme, it should be for the other party to form a judgment about whether the mediation continues to be a productive route toward settlement. The mediator's role is to help the parties toward settlement so long as they desire help, and to encourage them, with conviction but not coercion, that they should continue to desire the mediator's help.

A second dynamic is managing the opposing party's level of frustration with the party that is confiding to the arbitrator its flexibility on settlement terms and its acknowledgement of uncertainties about its litigating position. That party is often required to endure prolonged waiting periods in the course of a mediation session, while the opposing camp caucuses both with and without the mediator. When the message relayed after such prolonged waiting periods is a negligible improvement upon the prior settlement offer, the mediator must persuade that party that the process is not futile. That assessment can only be credibly maintained by the mediator up to a certain point without the help of the recalcitrant party. Part of the art of mediating is for the mediator to recognize when his or her credibility is intact, and when it is in jeopardy unless one party conveys to the other a serious signal of willingness to find common ground. When that point is approaching, it may be time for the mediator to suggest to the inflexible party that the mediator's credibility, and his or her ability to maintain the commitment of the opposing side, is at stake.

Another difficulty in mediations with one singularly stubborn party arises when that party (through counsel) openly welcomes evaluative comments by the mediator, to be delivered in private session, but will not concede to the mediator in confidence any uncertainty about the outcome on critical disputed issues of law or fact. Should the

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mediator suggest the futility of the exercise? Or be critical of the party for a perceived lack of candor? I think not. As an initial matter, the mediator should be prepared to deal with counsel who begin the mediation with a highly adversarial attitude. A number of factors contribute to this. If the case has been ongoing for a considerable time without settlement effort, counsel will have developed a certain degree of attachment to their advocacy positions, and possibly a degree of antipathy toward opposing counsel. Another factor is the presence of senior executives with settlement authority. Counsel may have or perceive a need to make a show of force for their own client, or for the business executive across the table. Further, counsel may view the mediation in part as testing ground, in which they seek validation for their litigating positions from the reactions of the mediator.

For as long as the mediation is continuing with voluntary participation of parties effectively represented by counsel, the mediator should assume that his invited, confidentially-expressed evaluative comments have an important impact on both sides, especially when the case is advanced and the mediator has become familiar with the key legal principles and essential disputed fact issues. Even with a mediator who enjoys great confidence from the parties, litigation counsel will understandably be reluctant in many cases to show outwardly any doubt of their positions on the merits.

But the mediator should persevere. Often there will be an advance on settlement terms without any accompanying explanation. And often the mediator will learn, at the conclusion of a difficult but successful session, that the party who was most aggressive defending its position against evaluative mediator input, is most grateful for the mediator's determination in creating uncertainty about the outcome.

One potential solution is to secure agreement of the parties to a limited hearing on the merits before the mediator. This may be coupled with an agreement that the mediator will share his reactions to the evidence and arguments only on a confidential basis with each side unless the parties otherwise agree.

The stubborn party that is genuinely confident of its position on the merits should in principle welcome the opportunity to persuade its adversary in a simulated hearing. Its unwillingness to do so may suggest to the opponent that its confidence is a pretense. So the party should ordinarily be reluctant to decline the invitation, and the simulated hearing followed by the mediator's confidential comments may succeed in breaking a deadlock.

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