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PERSPECTIVE

The failure factor in successful trust mediation

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Not all mediations yield settlement. Yet few cases—perhaps less than 1% of filed civil and probate matters—are decided through jury verdicts or statements of decision. Most civil and probate cases are eventually settled, either through further formal negotiations or from informal exchanges of proposals and counteroffers.

A passage from Samuel Beckett's *"Worstward Ho"* thus would appear to hold:

Ever tried.
Ever failed.
No matter.
Try again.
Fail again.
Fail better.

Entrepreneurs have embraced these words. Attorneys engaged in mediation advocacy may wish to do so as well.

How then may attorneys, in the aftermath of seemingly unsuccessful mediations, fail better? Comprehending why a mediation failed would be obvious. Ascertaining how resistance may be overcome would also seem self-evident. Some observations about this effort—limited to trust conflict since that is a realm in which subjective emotions tend to overcome rational thought—are offered.

A cause of failure

Trust contests often involve parties who perceive that they have been subjected to years, sometimes decades, of mistreatment from other family members. Children from an earlier union mistrust those from a later marriage. Siblings from the same parents have their own rivalries.

These grievances can enflame mediations. Retribution rather than resolution can be the overarching objective. Parties may be disinclined to offer anything that could be construed as a concession. Attorneys may not be authorized to make any conciliatory overtures. These mediations will fail.

Most trust litigation, however, ultimately rests on an elemental facet of human nature exposed centuries ago by Niccolo Machiavelli in "The Prince": "[M]en more quickly forget the death of their father than the loss of their patrimony." Over time, self-interest can induce a resumption of negotiations. Mounting attorneys' fees that reduce an anticipated inheritance serve to undermine the resolve of parties who earlier may have rejected settlement. The specter of an uncertain outcome, looming larger as the date of trial approaches, has the same effect. And always, money in hand has an allure greater than bounty still to be unearthed.

Patience thus may serve attorneys well in endeavoring to overcome these kinds of toxic family dynamics. Within the framework of three-dimensional chess played by attorneys, the fourth dimension of time may come to exert inexorable pressure on the parties. With each invoice for attorneys' fees, parties may be forced to acknowledge, if only to themselves, that revenge may come at too great a cost. Parties may in this process be compelled eventually to reconsider the desirability of negotiation to preserve some part of their dwindling inheritance.

Another cause of failure

The emotional facet of trust mediation has two related psychological

components. One is that parties simply may be incapable of making commitments. Another is that parties may not wish to give the appearance of bowing to demands made by their opponents.

These considerations influence negotiations because trial and mediation entail different decision-making matrices. For trial, closure of disputes rests with judge or jury. Parties are relieved of that responsibility and, in many ways, burden as well. In contrast, nothing ends in mediation without the engagement and agreement of all parties. Parties cannot avoid getting to and ultimately saying yes if they are to end hostilities.

The achievement of the latter outcome, however, requires preparation. As observed, not all parties are comfortable making decisions. Some may have relied for most of their lives on others doing so for them. Discomfort and inexperience may converge during mediation to lead them to indecision. Attorneys must plan for this possibility, finding ways to facilitate the kinds of decisions that must be made.

The other impediment to settlement becomes manifest through what in lofty terms is called the Heisenberg Effect. Adapted to the social realm from the study of quantum physics, it refers to the influence observers exert on those they observe. Observers by their presence alter the behavior of those they observe. The latter change their behavior in ways that would not occur if observers were absent.

In mediation, parties may come to attribute too much cunning to their opponents. This perception can lead to tortured analysis. *I doubt the motivation of my opponents. They made the offer to gain some advantage over me. To avoid conceding too much, I should refuse to negotiate.*

To avoid such an impasse, attorneys may invite a mediator's proposal. The request of the mediator need not be made during the mediation itself. The effort can be made at any time, even months after a stalled mediation. The mediator presumably will have been able to ascertain the divergent goals and objectives of the parties. The mediator thus may be able to propose a resolution that permits the parties to think that their interests are reasonably achieved, with neither side acquiring nor relinquishing more than the other.

More cause for failure

Negotiation intransigence can also occur when opposing attorneys erroneously assess the strength of their case. As if they were engaged in a game of poker, they may think that they have four aces in hand. But their vision may be impaired. The third of the perceived aces may be a deuce, and the fourth may be a trey. Ignorance may support a bluff, until it is called.

Invoking a legal metaphor, opposing attorneys may believe that precedent is "on all fours" with their case. That may be an enviable position for them. But their analysis, even if not generated by artificial intelligence, may be incomplete or faulty. As often occurs, a hind leg of their "all fours" may be lifted.

For trust litigation in particular, such legal intransigence may be unwise. Different petitions raising multiple claims may be filed. The parties in each may not necessarily be the same throughout. The probate court is not compelled to manage all petitions together and need not address them all in a single proceeding. Attorneys who believe that they can prevail at trial and hence feign indifference to mediation may not be able to control how and when their dispositive arguments will be tried and decided.

Furthermore, the costs of getting to the point of decision may be prohibitive. Litigation is Newtonian in its core precept: For every action, there is an equal and opposite reaction. Litigation actions and reactions result in attorneys' fees.

Attorneys may thus better serve their clients by taking guidance from one of the older treatises on conflict resolution. In *"On War,"* Carl von Clausewitz counseled that the result of war is never final, that it "is not merely an act of policy but a true political instrument, a continuation of political intercourse, carried on with other means."

The extension of this time-tested maxim to litigation is direct. Trial may be regarded as the civil equivalent of war; mediation, the counterpart of diplomacy. Trial then may be viewed as an instrument of mediation. The specter of trial may not end a dispute, but a negotiated settlement will.

The aftermath of an unsuccessful mediation may be difficult to ascertain and anticipate. Any *post hoc* analysis will have elusive elements. As a certainty, however, a failure in negotiation need not lead inexorably to trial. Heightened emotions may cool with the passage of time. Mounting litigation costs will force a reassessment of achievable goals. Seemingly lustrous legal arguments may lose their sheen upon critical analysis.

Impasse in negotiation thus may serve as a beginning rather than an ending. Attorneys by training and experience are attuned to overcoming obstacles. They may always seek to fail better.

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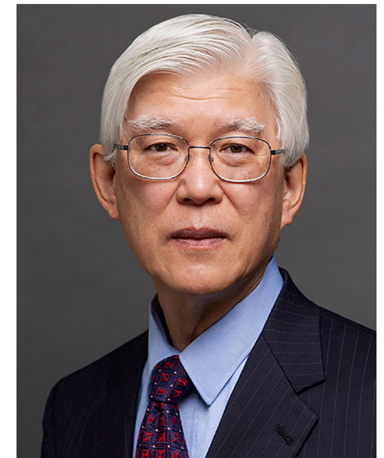

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