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Mediation is a team sport: maximizing the odds of settlement

By Wayne D. Brazil

I wish I had a dollar for every time I've heard a settlement judge or a mediator say, "I settled that case." Unless I've missed something, litigants enter settlement contracts, not judges or mediators.

But judges and mediators are not the only players in the mediation drama who are "pronoun challenged." In the first caucus of a mediation I recently hosted, a lawyer's first words were, "I hope you're up to the task you face today. You're going to have a really hard time settling this case. You'll be lucky to get much movement out of anyone. I don't envy your job."

In sentences like these, the pronoun that would reflect the most professional sophistication is neither "I" nor "you," but "we." Mediation is a team sport — at least when played to maximize the odds of achieving what most often is its principal objective: to identify as reliably as possible the best settlement terms that are accessible at this juncture.

The time to start thinking along these "team" lines is before the first pre-mediation phone conference. On the agenda for these conferences is which format the mediation best fits the specific circumstances. A lawyer who has a substantial preference for a particular format, or for a particular sequence of formats, might be well advised to call opposing counsel to discuss this matter before the phone conference with the mediator. If all counsel are on the same page about this issue during that conference, the mediator is quite likely to follow their lead.

Moreover, conceiving of mediation as a team sport can make an advocate's thinking about the format issue more nuanced and reliable. We turn to caucusing model because we want to reduce the sway of egos, the risks of friction and unnecessary alienation, and the artificial barriers to progress. In many cases these kinds of dangers can make caucusing clearly the most promising format.

But significant opportunities can be lost when caucusing dominates a mediation and a joint session may be the only format that will enable a lawyer to capitalize fully on a client who is particularly credible, sympathetic or empathetic. A joint session might be essential if an opposing party really needs to feel acknowledged or heard. Similarly, a joint session can provide the most effective means for disabusing an opponent of mistaken beliefs about a client's sincerity, conviction, role in decision-making, or staying power. Thus, it can be a major mistake not to use a joint session when visible characteristics or attractive attributes of your client could play a key role in the settlement dynamic or in an opponent's valuation of your case (e.g. re general damages).

Moreover, sometimes lawyers and parties need to be reminded that the case consists of more than numbers and abstractions. Sterilizing a dispute and abstracting the disputants can help in some settings, but demonizing is not helpful, and sometimes humanizing the dynamic across party lines can infuse it with just enough leavening to reach an agreement. There also will be times when face-to-face interaction is the only way to undermine acute distrust across party lines. Of course, joint sessions also greatly reduce the risk that the mediator will miscommunicate or fail to communicate something important to the other side.

None of this is intended to suggest that the joint session format is generally preferable to caucuses. But joint sessions also can present special opportunities — and a lawyer who conceives of mediation as a team sport is less likely to miss those opportunities.

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Counsel should reduce as much as possible the risk of false failure of the mediation process — failure caused by excessive posturing, social or interpersonal missteps; following the wrong process path by erring analytically; permitting competitiveness or some other impulse to displace judgment; or simply by giving up too soon.

The most sophisticated advocates and mediators understand that the odds of avoiding false failure improve dramatically when *all* the participants in the process accept their fair share of responsibility for how the mediation unfolds and for the health of the process itself.

A good mediator knows that there is no single process model that is optimal in all cases or circumstances. One size does not fit all. A good mediator also knows that the route to the best process decisions ("what should we do next") begins by identifying the full range of alternatives — and proceeds by analyzing each alternative with as much information and from as many perspectives as possible. These objectives are best achieved by multiple minds working from multiple information bases.

What does all this mean for lawyering in mediations? First, a good lawyer *explicitly endorses the goal* of using the mediation to identify what terms of settlement might be accessible — and explicitly acknowledges their share of responsibility for achieving that goal. Lawyers also understand that one of their primary missions in a mediation is to enable and encourage the mediator to be the most effective possible emissary for their client and its views and positions — especially when the mediator is meeting privately with other parties and lawyers. Toward that end, the wise lawyer wants the mediator to feel a lot more like a teammate than an adversary.

Good mediators understand that no one has a corner on the wisdom market, and that mediations are most likely to be successful when each participant (including the mediator) is prepared both to coach and to be coached. Especially when a case has been well-developed, the lawyers and litigants are likely to have learned things about one another that a mediator would not know but that could help predict reactions to possible next steps.

So counsel should not be reluctant, at any juncture in the proceedings, to initiate a discussion with a mediator about what the process options for next steps might be — and about the pros and cons of each. In assessing each option, wise counsel will try to see it through the eyes of the other players — to try to predict whether it would encourage the kind of participation or response that would advance the negotiations.

Thinking of mediation as a team sport also can improve the odds that counsel and mediator will be able to deal effectively with apparent impasse. "Apparent" impasse is ubiquitous. Real and insurmountable impasse is rare. Good lawyers need to be able to distinguish the apparent from the real. The likelihood that they will be able to do so improves significantly if they are prepared to "teamwork" their way through the process. Success in pushing past an apparent impasse often depends on correctly identifying its source, and it is more likely that the parties will identify that source if all of their minds work (perhaps in separate caucuses) on the problem than if they relegate this responsibility to the mediator.

What if an opposing attorney or party is aggressively anti-team, or only pretends to be a team player in order to try to gain some advantage? In these circumstances is it naïve, or even dangerous, to think of mediation as a team sport? Not necessarily. An experienced mediator is likely to see or sense this situation — and to more thoroughly filter or dissect inputs from the "gaming" player. And an experienced advocate who sees or senses this situation can simply recast his definition of his team to consist of himself, his client, and the mediator.

While a team-playing advocate should never expect the mediator to take sides, he can feel confident that his approach to the mediation will never alienate the mediator. The bottom line: It's almost always better to have a mediator who feels like they're part of the team than one who doesn't.

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