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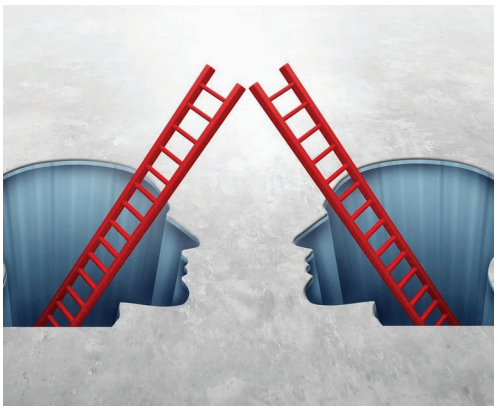
Navigating Complex Commercial Disputes in Mediations: Ill-Equipped Parties

By Myrna Barakat Friedman

I find the old adage "where there's a will, there's a way" applies generally in life and, in particular, in mediations. Indeed, I have yet to find a situation where two parties acting in good faith and wanting to reach a deal could not do so. With respect to mediations, I would even venture to say that, when one doesn't lead to a settlement, it is because of one or both parties' state of mind and seldom due to the subject matter of the dispute itself. And thus, the truly complex and challenging mediations will often revolve around parties who, for one reason or another, are ill-equipped to settle.

In this article, I highlight some of the party-related challenges we generally encounter as mediators and share insights on how to address them. To do so, I have enlisted the help of four of my colleagues who bring a wealth of mediation and general dispute resolution experience to the table: Alfred Feliu, who mediates domestic commercial and employment cases, with most being in the employment setting; Deborah Hylton, whose mediation practice focuses on business disputes, whether between two organizations or an organization and some of its constituents; John Siffert, who mediates commercial matters and is currently the Special Master and Court Appointed Mediator for a Title VII case where he is tasked with determining the backpay and pension for nearly 5,000 class members; and Janice Sperow, who mediates international and domestic commercial disputes, as well as domestic and California Private Attorneys General Act disputes and mass claims.

Mediation is truly about the parties, their state of mind and, to a great extent, willingness to put aside issues, or, rather, as Janice noted to me, "overcome issues … address them, acknowledge them, but not allow them to control the outcome that marked prior dealings and focus on the future." It requires a clear understanding,



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and embrace, of the objective of the mediation, namely crafting a solution that may not necessarily be optimal for them but one that is within both parties' realm of acceptable outcomes.

Ill-informed Parties. Ideally, the parties come to a mediation equipped with the facts and some basic understanding of the legal rationale behind their position and that of the opposing party. And yet, as Al points out, "a recurring issue is a party's almost complete lack of knowledge of the opposition's positions and claims. Counsel, for reasons known only to them, too often seem to feel the need to insulate their clients from the "bad news," i.e., the

facts and arguments against their clients' positions. Under these circumstances, the clients are hearing the other sides' positions for the first time at the mediation." It's important for a mediator to determine early in the process if parties do not understand the key facts. And if they don't, then they need to remedy the situation. As Al suggests, they can use the caucus to share objectively the facts and claims offered by the other side.

Emotions. Party emotions can be a significant obstacle to settlement even for disputes that we consider to be "purely commercial." As Deborah notes, it is important to acknowledge "the mix of the subjective, personalized issues that may be implicated. Some point of personal pride, or loss, that needs to be identified and recognized in some fashion. Failure to identify these subterranean, less objective factors can prevent agreement." Generally, separate caucuses to allow parties to vent, joint sessions to allow them to hear each other and pauses in mediations to let them "cool down" are tools that mediators use to address the emotional aspects of a dispute. However, as John notes, "it is important to recognize that it may not be possible to get a party to move when they are emotionally invested in proving a point, even after they understand that the evidence doesn't establish the point they are trying to prove. In those situations, it may be only a question of timing, which is why some cases ultimately settle on the terms initially outlined during the mediation, but only after a period of time has elapsed."

Appreciation for Opposing Side. Ideally, parties will have a clear appreciation of the other side's perspective. But, as Al points out, that "is desirable, but not always present." And when it isn't present, a mediator finds strategies to motivate the parties using different "carrots" or simply with different characterizations.

Al shares the example of "a three-way dispute between a contractor, a major quasi-governmental agency, and an employee of the contractor alleging harassment and discrimination occurring while performing services at the agency. The contractor denied knowledge of the facts underlying its employee's claims. The greater the effort to educate the contractor regarding its employee's claims, the less willing it became to engage in the process." Rather than pursue that discussion further, Al focused on the contractor's goal of obtaining further work from the massive governmental agency and addressing the agency's concern for indemnification of any expenses incurred and its need for public disclosure of its expenditures. According to Al, the contractor engaged on that basis, and the matter resolved with the contractor taking reasonable positions vis-à-vis the governmental agency and addressing the agency's concerns regarding indemnification of costs.

It's important to note, as Janice does, that the parties "do not really need to know why the other side wants something if they know how the other side sees the issue. In other words, one party can have a different or even hidden agenda, that the other party does not need to know and still understand their perspective."

Correcting the Record. One of the tricky questions that mediators often face revolve around the steps they should take, if any, to correct any misunderstandings or misperceptions upon which a party may be basing their settlement offers and decisions. On this point, John is quite adamant that he would not move "forward with a settlement knowing that the decision was based on a misunderstanding of the process…It is the mediator's job to achieve a settlement that both sides can live with. That means that both sides come to the agreement and understanding that is based on accurate information. Otherwise, the agreement is not knowingly and voluntarily entered."

As Janice points out, involvement would generally depend on the nature of the misunderstanding: "For example, if a party does not un-

derstand the binding nature of the agreement, what rights they are relinquishing or some other major basic foundational issue, then I will emphasize it to them. On the other hand, if I think they are not entering into the best settlement possible for them, then no, I do not become an advocate for either side. It is up to counsel to assist the client in getting the best deal."

It's worth noting, as Deborah references, certain "state rules of conduct for certified mediators place a high value on party self-determination and have lots of cautions against imposing the mediator's judgment." She notes that "specific facts would need to be evaluated against the ethical standards when deciding which approach to take. Communication of concerns through questions and thorough review of the settlement is the preferred path."

Counsel Obstacles. As John put it, and "then there are the lawyers. Some may not be inclined to settle for a variety of reasons, including the loss of a fee, an inflated view of the case she crafted, or unfamiliarity with the facts or law. But the biggest help that a mediator can provide often is to help a lawyer understand that the client's priority is to settle and move on, even if the lawyer honestly believes she can win." Janice points to examples "where the party wants to put the dispute behind them but counsel sees a lucrative case or counsel is simply a belligerent person, competitive, even at the cost of the client's best interests."

Generally, there is a consensus that counsel can sometimes make, or break, a settlement, and that mediators try to work with counsel, not against them. But, at times, it can be challenging. John stresses that he is "careful not to embarrass the lawyer in front of a client, and tries to present a unified front with the lawyer when talking to the client. It does not serve to divide the client from his or her lawyer. The lawyer needs to be an ally in getting to an agreement that is satisfactory."

When litigators can't put aside their adversarial ways, Al avoids joint sessions with parties and may opt to caucus with both parties' counsel together to "encourage them to put down their swords (even if only one side is being adversarial) and encourage them to work towards an amicable resolution rather than a jury verdict that will not be forthcoming at the mediation."

In situations where the attorney demonstrates that they care more about "winning" than the client, Janice asks to speak directly with the parties. Other times, when counsel "is not just posturing but rather truly believes they need to fight for each step," Janice may use "the attorney's zeal to the client's advantage to show they are ready to go to trial." In those situations, she "suggests a good cop/bad cop approach. Counsel can show how eager they are to litigate the case, while the client can sound more measured and reasonable."

As mediators, we ask parties and their respective counsel to acknowledge the core elements of their dispute but focus on tailoring a forward-looking solution that is workable for them in light of the various constraints within which they are operating. Ideally, to achieve that goal, the parties will come to the mediation armed with the tools to reach a settlement. However, in reality, it is not uncommon for them to commence mediation without all such elements. A key part of the mediator's role is to work with the parties and counsel to remedy any such deficiencies. At times, it will require working with the constituents to surface the relevant data needed to reach an informed decision. Other times, a mediator will simply need to change their mediation strategy to compensate for the deficiencies.

Myrna Barakat Friedman *is a commercial arbitrator and mediator. She can be reached at mbarakat@mbcap.com (BarakatADR.com).*