



Alternatives

TO THE HIGH COSTS OF LITIGATION

CPR INSTITUTE FOR DISPUTE RESOLUTION

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The CPR Institute is a nonprofit initiative of 500 general counsel of major corporations, leading law firms and prominent legal academics whose mission is to install alternative dispute resolution (ADR) into the mainstream of legal practice.

DIGEST

NEUTRALS' TECHNIQUES: Highly skilled neutrals manage mediation processes by relying on a large arsenal of techniques to get past impasse to resolution. Veteran Philadelphia mediator **Bennett G. Picker** identifies 15 barriers to resolution, and the ways to overcome them.

Breaking Down Barriers in Negotiation Through Mediation

BY BENNETT G. PICKER

Mediation of commercial disputes has risen significantly over the past decade. As the result of (i) multistep dispute resolution provisions in contracts; (ii) state and federal court-mandated mediation programs; (iii) governmental agency programs requiring mediation; and, perhaps most significantly, (iv) corporate America's mandate to use mediation where appropriate, mediation is now part of the fabric of dispute resolution in the United States.

In a recent mediation training session, a participant asked me, "Once a client makes the decision to explore a settlement, why do we need a mediator? Why can't we get there on our own?" These questions suggest a reason to mediate that has received far less attention than the drive to lower cost and explore business solutions based upon underlying interests—the process is an extremely effective alternative to direct and unassisted negotiations.

Direct and unassisted negotiations can and should be considered as the initial path to resolving disputes. When successful, negotiation is the most flexible and cost-effective approach to resolving disputes whether or not litigation is pending. The negotiation process, however, depends upon the parties' ability to commu-

nicate, their willingness to make concessions and their ability to recognize possible solutions. Especially in substantial commercial disputes, the barriers to resolution often are so significant that parties will not even attempt a negotiated resolution or often will reach impasse if they do attempt to negotiate.

Certain barriers to resolution occur with some frequency. The purpose of this article is to identify these barriers and to explore the ways in which a skilled and experienced mediator can overcome them.

NEUTRALS' TECHNIQUES

1. Selective Perception in Making Evaluations. Parties to a dispute and their counsel—both corporate counsel and outside counsel—invariably have difficulty making an objective evaluation of their own case. Recent studies by the Harvard Program on Negotiation and other institutions establish that self-interest and selective perception make it virtually impossible for any party or counsel to make a truly objective evaluation. Parties generally look for facts and law to support their own claims and overlook the evidence that might defeat their claims.

As Winston Churchill said, "Where you stand depends upon where you sit." A skilled mediator may be the only person in the room who can make a truly objective evaluation and act as an agent of reality. While mediation is a facilitative process, especially in its beginning stages, mediators can appropriately challenge parties to consider whether their assessments are realistic without offering their own opinions on the merits.

2. Wrong Baselines. Parties in a negotiation commonly compare what is on the table with what they want or need or with what

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they consider to be fair. A skilled mediator can work with the parties to have them make a real world comparison—one that compares what is on the table to the consequences that will occur in the absence of a negotiated resolution. A skilled mediator can challenge the parties to consider any offer in relationship to their *Batna*, or Best Alternative to a Negotiated Agreement, and *Watna*, Worst Alternative to a Negotiated Agreement. These become the baselines for what parties should accept or reject. Moreover, within these baselines, a skilled mediator will continually challenge parties to make realistic assessments.

3. Reactive Devaluation. It is common for a party to reject a proposal made by an adversary if for no reason other than the fact that it was proposed by the adversary. Parties often are unable to assess the accuracy of information or accept a settlement proposal as made in good faith because they distrust the source. This phenomenon is known as “reactive devaluation.” A skilled mediator can overcome this phenomenon by presenting proposals as his or her own or by simply floating hypothetical proposals. After learning the disputants’ general settlement parameters, a mediator often can float proposals likely to work for all parties.

4. Failure to Communicate. In some cases, parties litigate for years without any communications about settlement. Notwithstanding communications about pleadings, motions, discovery and hearings, many litigators focus on trial preparation and strategy to the exclusion of settlement. Many lawyers avoid settlement initiatives to dispel any suggestion of weakness. Settlement can occur—sometimes rather easily—if only the parties had communicated earlier and more openly. I have acted as a mediator in a few cases where there were not only the usual “gaps” between the parties, but there were “overlaps.”

In one case, a plaintiff said that while it would accept \$800,000 to settle its claim, the defendant would, in the plaintiff’s view, pay only \$500,000. The defendant confided that it would pay \$900,000 to resolve the dispute, but it was certain the plaintiff would not settle for less than \$1 million. Thus, there was an unrecognized \$100,000 overlap. In this instance, both parties had made realistic assessments about value, but inaccurate assessments

about the other side’s settlement position. A skilled mediator can facilitate good communication about settlement in cases where the parties are reluctant to do so on their own.

5. Gaps in Information. Information gaps often present barriers to resolution. In preparing for mediation sessions, a skilled mediator will recognize the existence of such gaps and encourage the other side to provide information, such as an accounting, that supports a claim for damages, or case law that supports an important legal position. Information ex-

of monetary exchange. While much has been written about the potential for “win-win” in mediation, the possibility of such a result is not purely theoretical. In some mediations, parties view the result to be better than their probable best result in litigation.

7. Inability to Align Client’s Interests. Many parties and their inside and outside counsel perceive a dispute as having only one dimension. In a typical dispute between two parties, the focus of negotiations will be primarily upon differing views between the par-

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changes can help parties resolve disputes on their own. In one case involving a professional partnership dispute, such an exchange resulted in the withdrawal of all claims and the termination of the dispute. Similarly, mediators are in a good position to clarify misunderstandings concerning the information provided or positions taken by either side.

6. Insufficient Focus Upon Underlying Interests. Many parties engage in “distributive bargaining” in which they exchange offers and demands in an effort to “divide the pie.” As a consequence, these parties fail to capture an opportunity to create value. In contrast, a skilled mediator will encourage the parties to engage in “integrative bargaining” and take a more collaborative approach to negotiations. Parties are encouraged to focus upon their interests as well as their rights and look for business-driven solutions. For example, distribution agreements can be restructured to provide for new provisions on territoriality or exclusivity. Supply agreements can be restructured to provide for future price discounts. If there is a continuing relationship, the parties will be asked to compare and contrast the issues in dispute with the importance of the relationship itself. Even in pure monetary disputes, parties can provide for creative means

ties as to facts, claims, defenses, rights, obligations, experts, damages, issues of credibility and outcomes. A more sophisticated analysis also will include the objectives, interests and needs of the parties. This one-dimensional approach ignores the possibility that the problem may have more to do with differences among and between the various constituent representatives of the client than differences between the parties. In one mediation, for example, the principal settlement obstacle was a disagreement about which division’s profit-and-loss statement would be “hit” by a substantial payment to the plaintiff. In another, the principal obstacle was a disagreement about when to settle given the fact that a settlement would require the company to restate its earnings. A skilled mediator will recognize such problems and be in a position to conduct an intramural mediation between the client’s representatives so that they can be aligned on settlement goals and positions.

8. Disconnects Between Attorney and Client.

A one-dimensional approach to a dispute (focusing solely upon differences between the parties) also ignores the fact that differences between an attorney and the client can create

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barriers to resolution. In numerous mediations, parties are unprepared to make realistic assessments where counsel overstated the likelihood of success at the outset of a dispute or failed to communicate with the client on an adequate basis. Conversely, counsel may make a fairly reasonable litigation-risk assessment—only to have the client refuse to accept bad news. In a recent dispute, upon hearing the opinion of counsel, the president of a fairly large company stated to his own attorney, “I thought you were *my* lawyer.”

In another dispute, at the conclusion of a successful mediation, an attorney privately said to me, “Thank you for telling my client what I could not say to him.” Contingent fees also may present barriers to resolution. In one such dispute, counsel for the plaintiffs argued against a settlement the client was otherwise prepared to accept because the settlement would not produce a sufficient return on counsel’s investment of time. Mediators are in a good position to discern and deal with any disconnect between attorney and client.

9. Anger and Embarrassment. When one party to a transaction believes the other party has engaged in misrepresentation or, in garden-variety breach-of-contract cases, the business representatives directly involved in the dispute often become hostile. Partnership disputes in which long-term partners and family members have stopped speaking are common. A skilled mediator can provide a forum in which to facilitate communication and permit the parties to vent, overcome anger and recognize the need for closure. In a number of “angry” disputes, an apology serves as a linchpin for resolution and, in a few cases, a predicate for a rehabilitated relationship. Parties also can become entrenched in their settlement positions, especially where they draw a “line in the sand” in negotiations at an early stage of a dispute. Many parties, even in the face of new information, become too embarrassed to change their positions. A skilled mediator can present new information and facilitate negotiations in ways that enable parties to change their positions and save face.

10. Behavior of Parties and Counsel. In direct negotiations, parties and counsel often will behave poorly and engage in conduct de-

structive to the negotiation process. Threats to walk away, assertions of lack of authority, nonnegotiable demands and intimidation are just a few examples of the techniques or tricks that can derail direct negotiations between parties. The mere presence of a mediator usually alters such behavior. In a mediation, parties and counsel are usually on good behavior as they want to convince the mediator that their conduct giving rise to the dispute was responsible. They also want to convince the mediator that their approaches to the negotiations are both fair and reasonable.

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11. Poor Negotiating Skills. Well over 90% of all cases in litigation are resolved prior to trial. While most litigators are well trained in advocacy and trial skills, they approach negotiations on a somewhat intuitive basis. It is not at all surprising, therefore, that many lawyers find it difficult to resolve a case until the ultimate imperative arrives—the looming trial date. Parties and counsel often approach settlement negotiations with a firm view of what they want or need, but without any consideration of what they might have to accept—their bottom line. Parties and counsel commonly make a thorough analysis of their own rights and interests, but often fail to make a significant analysis of the other side’s perspectives and interests. In most negotiations, advocates are far too focused on trying to convince the other side of the strength of their positions and insufficiently attentive to what the other side is saying. Many parties are unwilling to make a significant move in a negotiation because they subscribe to the conventional wisdom that “a party should not bid against itself.”

Most highly skilled mediators are well versed in the art and science of negotiations. Training and experience permits a skilled mediator to assist parties with their negotiating strategies and decisions. For example, notwithstanding the conventional wisdom that parties should not bid against themselves, a skilled mediator can show parties how they can anchor a negotiation in *their* zone by making the “first credible offer.” Mediators can also set a stage for parties to listen to each other carefully and respectfully. As suggested earlier, mediators can urge parties to make more objective evaluations and to compare proposals not to abstract wish lists, but to the consequences should settlement negotiations fail.

12. Inappropriate Reliance on Experts. In many disputes, parties develop hardline positions in negotiations due to a heavy reliance on their own experts. Given the late stage in the litigation process at which expert reports are exchanged, parties can be unaware for years of the positions of their adversary’s experts. A skilled mediator can provide for an early, informal exchange of opinions by experts. These exchanges can occur even before experts have formed their final opinions or offered their written reports. In several cases, I have conducted what can be characterized as a “minitrial within a mediation.” These mediations featured an informal, mediator-moderated exchange of experts’ opinions, where the experts have had a limited opportunity to state their conclusions and to pose questions to each other. In these “minitrials,” attorneys and clients attending the mediation have merely observed this controlled exchange. In each case, the opportunity to observe an exchange of the views of experts has resulted in a softening of hardline settlement positions and served as a predicate to resolution.

13. Preoccupation With Winning. Many companies commence litigation upon a belief that they have been wronged in a commercial transaction. Upon being served with a complaint, many companies perceive that they have been wrongfully attacked and, at least initially, adopt a win-at-any-cost approach. Business persons directly involved in the transaction at the core of the litigation often urge their key executives to seek a declaration of rights in order to be vindicated. While many larger companies have institutionalized ADR, the support from within is often neither very broad nor very deep. Moreover, smaller and more entrepreneurial com-

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panies rarely involved in litigation are even less inclined to compromise and often view the need to prosecute or defend a suit to be a matter of principle. In mediation, a skilled mediator can get the parties to recognize that not every case should be interpreted as a matter of principle. As one legal analyst stated: "Every case is a matter of 'principle' until the client receives the third and fourth bill from outside counsel at which time they will begin to spell the word differently—'principal.'"

In addition, a skilled mediator often will be successful in convincing parties that they need to focus not upon what happened, but upon the evidence a court will hear. While parties often want to litigate to establish the truth, a skilled mediator can suggest why they can only hope for "court truth" as distinct from "absolute truth." Ultimately, the mediator's challenge is to urge the parties to take a more bottom-line approach in pursuit of their claims and defenses. By examining all of the relevant considerations and viewing the dispute as a problem to be solved, most parties will realize that their most responsible decision will be one that involves some compromise.


14. Inability to Break Impasse. Parties who elect to engage in the process of direct and unassisted negotiations often find it difficult to overcome an impasse on their own. Skilled mediators recognize the first signals of approaching impasse when they hear statements such as "This is my bottom line," or "I knew

this would be a waste of time," or "We are leaving." A skilled mediator can also detect early signs of possible impasse from the non-verbal conduct of the parties. Skilled mediators are particularly adept at determining whether the "impasse" is a matter of posturing or whether it is real. If the perceived impasse occurs as a consequence of posturing between the parties or by a party with the mediator, mediators use a number of techniques to generate movement and overcome the problem. Even when a real and ultimate impasse occurs, skilled mediators are well versed in a number of impasse breaking techniques, for example, adjournment, requesting a "last-best" offer proposal, or using a double-blind proposal. In such an instance, the proposal is made to each side confidentially for their acceptance or rejection. Unless both accept, a party will not know whether the other side has accepted the proposal.

15. Process Barriers. Each of the above paragraphs illuminates the barriers to resolution in party-to-party negotiations and the ways in which a mediator can overcome them. In addition to the techniques, skills, and strategies that a mediator brings to the process, the simple fact that there is an event—the mediation itself—enhances the potential for resolution. In many cases, parties are simply not ready to resolve a dispute in direct negotiations because of their need for a day in court. Mediation can provide the needed "day in court" by giving the parties an opportunity to tell their story and get feedback from a neutral. Moreover, in mediation, parties are better prepared for negotiations and are required to make decisions within a defined

time frame. Further, in direct negotiations parties often need authority to settle at levels beyond their authorization or are concerned about the need for cover in order that their settlement decisions not be criticized at higher levels within the organization. Recommendations or feedback from a mediator often can satisfy these needs and concerns. Finally, in direct negotiations it is easy to blame the other side for any failure to achieve resolution. In contrast, parties in mediation are likely to become invested in the process and work harder to achieve a resolution; achieving resolution becomes a part of the definition of "success."

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Whatever the barriers to resolution, good mediators bring to the table an understanding of the social psychology of negotiations and an appreciation for how parties perceive and deal with the issue of risk. Highly skilled mediators are well versed in mediation techniques like paraphrasing, framing and the use of mediator transparency. They also know how to manage the process when a party is not acting in good faith or where there is an imbalance of power. The best mediators apply leadership and problem-solving skills and earn the trust of the parties. Ultimately, they will involve the parties directly in the search for solutions. While direct and unassisted negotiation should remain the initial path to dispute resolution, where some of the above barriers appear to be an impediment, parties should recognize the benefits of a facilitated negotiation with the help of a skilled and experienced mediator. 

FURTHER READING

These observations on barriers in negotiations are based on my experiences in mediations. There are a number of important works that examine similar barriers in negotiations from a theoretical perspective. Among these are Robert Mnookin's diagnostic approach, which identifies four classic barriers to agreement: cognitive, strategic, principal-agent and reactive devaluation. See Robert H. Mnookin, "Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict," 8 *Ohio State Journal on Dispute Resolution* 235 (1993). Christopher Moore, in his "Circle of Conflict," identifies conflicts as emanating from data, interests, structure, values or relationships. See Christopher W. Moore, "The Mediation Process" 27, Jossey-Bass Publishers (1986).

Any critical analysis of the negotiation process also must recognize the effectiveness of a problem-solving approach,

in contrast to a more competitive approach focused upon winning. Carrie Menkel-Meadow addresses the benefits to be achieved by parties crafting solutions to expand the available resources and meet the needs of the parties. See Carrie Menkel-Meadow, "Toward Another View of Legal Negotiation: The Structure of Problem Solving," 31 *UCLA L. Rev.* 754 (1984).

Gerry Williams' analytical approach identifies the five steps for recovering from conflict (denial, acceptance, sacrifice, leap of faith and renewal). Drawing upon the literature in law, psychology, anthropology and related disciplines, he discusses the potential for the disputants to be transformed by the process. See Gerald R. Williams, "Negotiation as a Healing Process," 1996 *J. Disp. Resol.* 1.

—Bennett G. Picker