ADR°6

ALTERNATIVE DISPUTE RESOLUTION

A MEDIATION AND ARBITRATION GUIDE FEATURING PROFILES OF ATTORNEY NEUTRALS THROUGHOUT THE MIDWEST

Illinois

Indiana

Iowa

Michigan

Wisconsin

Law Bulletin Publishing Company | LB Established 1854

Avoiding Mediation Impasse

By Stuart M. Widman

Like any dispute resolution process, mediation requires preparation and adaptive thinking. Listed below are helpful hints — to both mediators and counsel — in order to lead to a fully-successful mediation. A mediation can still be successful, even if not fully settled, if the parties are able to resolve some, even if not all, of their issues. Thus, there can also be many bridges of smaller impasses by following these suggestions.

Expressing Judgment. Before the mediation session, the mediator and the parties should agree on the mediation style that is to be employed. The choices generally are: (i) facilitative, where the mediator does not directly assess the parties' positions or strengths, (ii) evaluative, where the mediator will pass judgment on the parties' respective strengths or weaknesses, and (iii) a facilitative/evaluative combination, where the mediator starts with the facilitative process but employs evaluation later if it is necessary to overcome impasse. Most cases that this author handles employ the third option.

Unless all parties agree to some form of evaluation, the process should be solely facilitative. But even when evaluation is employed, the mediator should refrain from espousing an ultimate judgment, such as "Plaintiff will recover X thousand dollars." Rather, the evaluation should be phrased as "Plaintiff has a stronger position on liability," letting the parties ascribe the dollar figure for purposes of negotiations. Of course, if the parties want the mediator to propose a dollar range or a specific dollar amount for settlement, the mediator should oblige with that specific evaluation.

The Layered Look. The mediator and counsel must peel through the different layers of the dispute. On the surface are the parties' claims, often reflected in court pleadings. Behind those are the business aspects of the dispute — the financial or other transactions that initially brought the parties together. And underneath both of those are the personal interests and motives of the individuals who will make the decisions for themselves or for the businesses that they represent. Plumbing for the last element before and during the mediation is a key to success. That is where the decision-makers' risk tolerances and most important needs are often discovered.

Informational Impasse. Perhaps the greatest impediment to a successful mediation is the lack of necessary information for the parties and the mediator. Examples are: completion or repair costs in a construction mediation; evidence of alternative means to create the data or information in a trade secrets case; and financial statements in a collection matter or incentive payment case. This problem most frequently arises where mediation is attempted pre-litigation or before adequate discovery is completed in litigation.

The mediator and the parties must anticipate their informational needs and either exchange the materials before the mediation or bring them to the mediation. The mediator plays an important role in emphasizing the benefits of a fully-informed mediation. It enables the mediator to better prepare, and it allows the parties to better assess their risks. Of course, the mediator should not pressure the parties to exchange documents that are either privileged or might only be disclosed by a party in a private caucus with the mediator.

Effective Submissions. An effective pre-mediation submission should contain: (i) the names and positions of each party's likely attendees; (ii) copies of the relevant pleadings (complaint, answer, motion to dismiss, and summary judgment motion) if there is litigation; (iii) a statement or summary of the claims and key factual and legal issues; (iv) key documents, experts' reports, and damage analyses; (v) each party's statements of the three primary strengths of their claim or defense, and of the other side's claim or defense; (vi) each party's percentage likelihood of success on the primary fact and legal issues; (vii) a statement of prior demands and offers of settlement; (viii) each party's economic bottom line to settle; (ix) a statement of any non-economic components of settlement that might be considered; (x) each party's statement of the primary impediments to settlement; and (xi) whether there is insurance to fund any settlement.

All except the pleadings and statements of key legal and factual issues are confidential submissions to the mediator. These submissions will enable the mediator to fully understand the dispute, to generate questions and challenges during the private caucuses, and to begin to evaluate the parties' respective positions in the event that the parties have asked for an evaluation by the mediator. The submissions should be given to the mediator at least three days before the mediation so that the mediator can contact the parties' counsel if statements in the submissions need to be clarified. Counsel should not object to the breadth of these submissions, as it should be part of his or her normal preparation and advocacy plan for the mediation.

The Mediator Is Not The Audience. Although the mediator plays a vital role and can influence the outcome, the parties' opening statements should be directed to the opponent's decision-maker. He or she is the person who really needs to be convinced to settle the matter on terms other than what he or she may like. I urge each party's spokesperson to speak to the other side as if I were not even in the room. I view any non-belligerent point/counterpoint that occurs directly between the parties during the joint opening session as productive engagement that can help break down barriers or get clarification of positions.

Understanding Confidentiality. During the joint opening session, I explain to the parties and their counsel that anything said to me in a private caucus (especially offers and demands) is confidential — like their submissions — unless and until I am permitted to communicate the point to the other side. It is essential that the parties understand that in order to encourage openness and frankness during the caucuses. Notably, the Mediation Agreement for the Cook County Law Division Program takes a different approach, stating: "Any communication or document disclosed to the mediator during the caucus may be communicated and disclosed to the other party unless the mediator is otherwise advised" Under that arrangement, the burden is upon the party to identify all that is not to be disclosed rather than giving the green light to the few things that can be disclosed. I suggest that the better approach is the one that I use.

Selling an Overriding Philosophy. Getting the parties to agree on a common and overriding goal or philosophy during the initial joint session is an important step. It becomes an anchor to which both the mediator and the parties can periodically return in order to refocus efforts and reestablish priorities for the mediation. For example, in a recent mediation, the two parties were fighting over the split of past and future royalties generated by cutting-edge technology in a highly-competitive industry. During the joint session, both sides agreed that it was advisable for them to resolve the dispute and continue to work together to market and promote the technology, thereby avoiding any fracturing of their relationship which could create openings for the competition. Both sides recognized that a royalty split that made neither happy was better than what they each might get if the competition surpassed them in the industry and the parties' total royalty revenues were substantially reduced.

Continued on page 73

Continued from page 13

After a While it's Just Money. In the early stages of a mediation, the parties' respective positions on each of the many issues will be explored in detail. Factual and legal issues will be addressed and even dissected. But a transformation occurs later, especially after a couple rounds of demands and offers are exchanged. At that point, the specific factual and legal disputes begin to disappear into the background (although they are sometimes briefly revisited) and the negotiations become more focused simply on money. Since the parties and their counsel have emotional ownership of their supporting law and facts, impasse can be avoided if later settlement discussions do not backtrack too much to the earlier details. In other words, momentum transfers from the factual and legal discussions to the dollar exchanges, and that momentum should not be interrupted.

What About Bad Offers? Each mediation has its own "flow," and the parties and mediator should try to not interfere with it. Insulting offers could chill discussions and create barriers. Thus, even in a facilitative mediation, I often will defer the communication of a bad offer. Clearly, the parties may have a reason to take a strong stand early in the matter, but they should also realize the potential impact. My solution is to make it a matter of the timing of the proposal. I explain to the offering party why I think it is best to delay the offer.

Returning To Joint Session. It is often necessary to bring the parties back together for a concluding joint session in order to bridge any final gaps. They may be willing and even anxious to discuss directly minor issues that are not best served by shuttle diplomacy. In a multi-day mediation, bringing the parties together at the end of each day also offers other opportunities. The mediator can, with the parties' consent, disclose to the group the progress that has been made — what issues have been resolved or abandoned, what information each side will deliver or bring to the next session, and how the dollar difference has narrowed. Each side can then feel the progress in the presence of the other side, creating some combined energy to build on for the next session. An alternative to the parties meeting together is getting their counsel together to discuss progress and impediments. Whether to bring the parties or just counsel together may depend upon the good will that does or does not exist between them.

Avoid The Pull Of Gravity. Since most mediators are lawyers, and especially litigators, upon reviewing the submissions, they experience the inevitable attraction to one side's case or the other. It is vitally important to resist that, or at least not show it, as it interferes with the neutrality and evenhandedness that the parties expect. Of course, competent reality testing of each side's positions requires critical analyses and sometimes blunt questioning, but it is essential that the mediator not exhibit any bias or predisposition toward one party's case. If the mediation becomes evaluative, there will be plenty of opportunity for the mediator to voice his or her views of the claims and defenses.

Stuart Widman is a commercial litigator, arbitrator and mediator with Miller Shakman & Hamilton LLP. In recent years he has been the arbitrator or mediator in matters totaling over $225 million. He is also a frequent speaker and author on ADR topics. This article is based upon his presentation in September, 2005 as part of a mediation series sponsored by the Circuit Court of Cook County, Law Division, Mediation program. It is submitted at the invitation of ADR Systems of America, for which Mr. Widman is on both the arbitration and mediation panels.