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ADR Techniques

Process Problems: Intervention Points For Recurring Mediation Logjams

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Different practice areas reveal different stumbling blocks for neutrals. Patterns emerge, and sticking points surface repeatedly.

This author has conducted hundreds of mediations involving commercial and employment matters; trade secrets; restrictive covenants, and issues of international law. This article focuses on those potential trouble spots, based upon actual as well as hypothetical mediation scenarios. The following is intended to develop some of the common trouble spots and provide constructive suggestions to make mediations more effective. s

The focus is on:

- Unforeseen or unintended bias that arises, which distracts from the mediation matter at hand and needs to be diverted;
- Bonding with the parties, an essential task for mediators in order to build trust both between the parties, and between the parties and the mediator;
- Issues that arise between the parties and their counsel where the mediator has to make a move to keep the mediation on track, and
- Combining elements of the first three as well as your best process skills to establish buy-in by the parties into the entire process.

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These are recurring issues. Sometimes they are problems. Sometimes they are part of the normal process—occurrences that arise that all mediators need to be prepared for. All of the scenarios discussed below have been disguised either by adding or removing certain facts or circumstances, or recounting scenarios that are a compilation of multiple matters, in order to protect the parties' privacy and not infringe on the confidentiality of the mediation process.

UNFORESEEN OR UNINTENDED BIAS

This author was mediating what had been a commercial litigation dispute dealing primarily with the collapse of a large roof. It involved multiple parties.

I was meeting with the parties and their counsel to get their initial positions, and understand the economic realities of the litigation. In one of those preliminary discussions, counsel for one of the parties told me this was a simple case and everyone knew the

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becoming the content and form of delivery of a communication from the governing body to the congregation. After a significant number of proposals, counter-proposals, drafts, and dictionary-based wordsmithing, a document was created to be read by the pastor at a regularly scheduled meeting of the congregation.

Acknowledgements were made—but not of wrongdoing by anyone, and no apologies were included in the text. It was agreed that the claimant and her family would not be present, and that I would answer any questions from the congregation.

All went smoothly. My own heart was touched by the courage and grace of the ex-wife of the terminated pastor. I had not previously met her since she was not a party to the mediation. She stood before all to say that the resolution was best so that she, her ex-husband, the congregation, and the young woman could find peace and begin the true healing process to move forward in their lives.

THE GOLD MEDAL: APOLOGY, FORGIVENESS, AND REDEMPTION

There are times when the enhanced communication modalities inherent in the process of mediation transform the participants' hurt and feelings of betrayal.

At times, an appreciation of the harm a disputant caused in the other underlies concessions and compromise. Participants transcend the remnants of the conflict with an eagerness for a fresh start. The past truly fades in the bright light of hope.

More than once I have been privileged to witness people emerging from the chaos of destructive litigation with malice toward none, with forgiveness on their tongues flowing from their hearts. One or more participants have acknowledged their wrongdoing and made economic and other concessions to the other participants as compensation for their betrayal.

ADDITIONAL READING

Rodger L. Jackson, The Sense and Sensibility of Betrayal: Discovering the Meaning of Treachery through Jane Austen, *Humanitas* 13 (2): 72–89 (National Humanities Institute. 2000)(available at http://bit.ly/2c46cEE).

Abraham Maslow, Motivation and personality. (New York: Harper, 1954) (available at http://bit.ly/2crnpJ8).

Nachman Ben-Yehuda, Betrayals and Treason: Violations of Trust and Loyalty, (Westview Press, 2001).

They write or deliver formal apologies. They vow not to cheat or cut-corners anymore. Policies and practices change. They replace or educate personnel.

They do it for the other–and for themselves.

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answer in advance—just like the Israel/Palestinian problem.

I tried to understand his point and then spent the next hour not on roof construction, but on Israel and Palestinian issues that have been intractable for so long. I did not understand how he knew the "answer" that no one else did. And I had no idea there would be significant ramifications in this mediation.

Suffice to state that we spent considerable time on an unrelated issue that I had not anticipated, but was quite involved with on my own. What were the consequences for the mediation at that point?

The joint sessions moved on. When I next spent five minutes with another party and counsel privately, they were upset, and said that I short-changed their position even though I already fully understood it. In this group, one of the principals was trying to demonstrate knowledge and expertise for the benefit of his subordinates, and not really for me. Instead, they asked why the first party—one of five at the table—got one hour of joint-session time.

I may have had less patience than needed since it was primarily a cost allocation. At that point, we did not fully connect.

And at the same time, I realized that the entire room—other than that first party—had no idea what animated my first discussion. They were concerned that they did not get the same attention, and that perhaps I was not sensitive to their positions.

This unanticipated first discussion created an impression of potential bias. It needed to be corrected immediately with each of the other parties.

I then met separately with each of the other parties and counsel, and explained what had occurred. It was important that I regain the trust and confidence of parties and counsel. In mediation, you really do need to be an honest broker.

It was critical to correct the imbalance in the room with full explanation of the side discussion.

Obviously, in hindsight, parties picked up cues that were not intended, making progress on the main issues impossible. When I methodically spoke to the other participants in equal measure, they were ready to move back to the economic and other litigation issues.

While I like to think stories—more below—can be helpful and used as confidence builders, mediation room segues into volatile political areas is dangerous territory. Even though I did not introduce the subject, I should have deflected and not engaged in that unrelated and controversial topic.

The lesson is that mediators must avoid bringing up such subjects, and move the room past them when others bring them up. While parties may make side comments that can be provocative, there is little gain for the mediator to engage on the subject, and he or she must be mindful of the time investment and then balance it with all other parties.

Parties and counsel watch and listen to the mediator. Conduct and comments that may seem harmless or even unrelated to the main topic must be evaluated by the mediator. Often they create unnecessary diversions for all concerned and make the mediator's job harder.

The mediator must provide nearly actual equal time to be effective.

BONDING WITH THE PARTIES & COUNSEL

What enhances bonding or creating trust with the mediator?

A favorite example is a difficult employment case involving discharge, with racial overtones. While working with the plaintiffs, I offered them tea, which sparked a discussion.

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My kitchen had a substantial tea collection. One of the women mentioned that she liked tea, and asked if I had ever been to tea. I wasn't sure exactly how to respond, but I had just returned from a trip to Bangkok. Tea service at the Peninsula Hotel was lovely and quite ceremonial. So I recounted my visit, and then asked if I could brew tea for them. They liked the idea, and I offered them the opportunity to select their tea.

It was served in proper teacups. Yes, this took some time. But we bonded. The plaintiffs developed a level of trust with me.

When the matter was nearly resolved, there was a question over when the plaintiffs would actually resign. After discussion, they agreed to leave their positions at the end of that same day. I do not think that conclusion would have been possible if we had not spent some time together earlier, over tea.

The key is not tea. It is engaging in conduct that will build trust and confidence between the parties and the mediator. The tea is really just a metaphor. Once trust is established, the mediator is in a far better position to facilitate a resolution that will help all parties.

ISSUES WITH COUNSEL

One of the most difficult situations to arise occurred in a recent mediation. I knew both counsel but had not seen them in many years.

We all change over time. But unfortunately, in this instance it was apparent there were serious memory and other cognitive issues. It became a problem as the day progressed.

We had, in fact, reached a partial settlement, but a few facts emerged. The attorney had not discussed the full parameters of the settlement with the client, leaving me in a difficult position.

In addition, the lawyer was not able to retain the positions in his head and did not make notes. This often is a sign the mediation may derail. Note-taking or issue inventory at each step by the mediator and counsel can be helpful.

It was apparent in a joint session with both counsel that the advocate was having some difficulties. I was not completely able to overcome the situation.

The issue with counsel also exacerbated the negotiation process, since the other principal became aware of the problem with adverse counsel. The principal said his time and money was being wasted due to this problem.

It actually became impossible to define a final "deal" because the plaintiff was not on board. In fact, the plaintiff had not been fully informed by her attorney.

My dilemma was that I could not step between counsel and client. In addition, when we got near what appeared to be the end of the deal, one attorney kept changing the terms at the table, frustrating the process.

Both counsel actually reduced the settlement to writing, but it fell apart at the last minute due to frustration that was attributable to backtracking on principal points.

Are there any good solutions? It is nearly impossible to step between counsel and client. My best suggestion is to make sure you have met in caucus with each side, including clients and counsel, to ensure that positions are agreed upon before brought to the table.

This can be time consuming. I often engage in meeting privately with counsel in separate rooms when I feel it is necessary to discuss proposals—as all mediators are open to doing—and then usually leave it to counsel to communicate with their clients in the most effective manner for them.

If that communication does not take place, the mediator is usually stuck: You don't know what was said in the attorney-client meeting. Or, as in my case, counsel was inconsistent at the table.

Be careful to analyze the inconsistency of counsel at the table. Is it cognitive problems? Or is it a clever negotiating stance? Another possible solution is to suggest each side keep a running term sheet that is agreed upon.

As a matter of fact, a joint term sheet might avoid or minimize this problem. Frankly, I rarely make notes during most mediations. In this situation, however, the better approach is to constantly affirm your understanding in a separate caucus with attorneys and clients.

While I often use meetings with counsel only to move a subject, this circumstance needs a different approach that is always mindful of the attorney-client relationship.

Once it becomes apparent to clients on each side that not all information is being properly processed and communicated by their attorneys, then it is simply out of the mediator's hands. I cannot intercede or cause a fissure between client and counsel.

At the same time, an attorney arguably has an obligation to report the mental incompetency of another attorney under professional conduct rules. But what constitutes mental incompetency, and how it is affecting representation, is not easily identifiable. What may seem like competency issues initially actually may be a clever strategy by the attorney-advocate.

Layering the competency issue into a mediation setting, which is subject to its own ethical obligations and local confidentiality laws, adds to the difficulty in determining the course of action.

In this situation, the person in the best position to address and possibly report an incompetent attorney is the client. The client's vantage point provides a clear perspective as to whether the attorney is genuinely facing competency issues.

But the same cannot be said for the mediator, for whom there is no clear mandate to report. Nor is there a definitive answer as to the exact judgment call to make.

In the matter described, the deal never reached fruition even though we had drafted an agreement. It imploded internally on each side.

The bottom line is that when it becomes apparent there is a communication issue between an attorney and the client, the mediator is in a precarious position. I suggest proceeding carefully and having sign off at all times—by parties as well as counsel.

TRUST AND VERIFY

In order for a mediator to complete his or her task there must be "buy in" by parties and counsel. We have a fine line working with all or both, individually and separately. For me, it is a judgment I make at the time of the live sessions and based upon interactions. If I have had meetings in advance to work on complex issues, I will already have a sense of the key players.

We must always be mindful of and respectful of the attorney-client relationship, and not interfere nor cause any issues for the attorney even if there are concerns.

There are common themes for mediation success in the face of bargaining table adversity.

First, confidence building is critical for a mediation to succeed. It can be done by a variety of methods in each case. Something as simple as making tea has always represented for me the ability to bond and discuss a subject with parties so they may later feel comfortable with me and my judgment about a potential resolution to their litigation.

While I would not suggest the tea made the employment case plaintiffs likely to agree with my thoughts on an effective time for their resignations, it certainly helped in opening a personal dialogue which I might not otherwise have established.

I have used many stories and life experiences in other cases to do the same. If there is buy-in early by the parties, it makes resolution more likely.

I recently listened to a retired judge discuss his mediation techniques. He said the morning sessions are just for "schmoozing and stories." That is interesting, but most cases do not permit the luxury of a get-acquainted morning. The point, however, is the same as the tea anecdote.

Working with counsel requires a parallel track at the same time to make sure there will be resolution, and they will assist in bringing along their clients.

Stay focused on the main subject of the litigation and avoid distractions. If counsel tells you resolution is as simple as solving the Arab-Israeli dispute, and everyone knows the answer, try to stay on track. If he really knows the "answer," then call the United Nations!

The distraction may be far more subtle than a political outburst, and may not even be noticed by the other parties and litigants. The diversion only gets in your way as a neutral broker.

There must be actual and perceived balance in your approach, attentiveness to all sides and understanding of concerns and biases.

Reaching a deal is the goal of mediation, but understanding the parties and counsel is critical if you expect to succeed in your path to that agreement.

Employment ADR

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transcended philosophical and political arguments over class-action litigation and alternative dispute resolution, and instead has become, at least in part, a referendum on access to justice.

The Court, still down one member, has entered its new year this month with this issue presented in as clear a circuit split as can be constructed. The employers want the Court to extend *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333 (2011)(available at http://bit.ly/1NSx2bC), a consumer contract case that held that a California state law prohibiting class waivers disfavored arbitration, counter to Congress's purpose and the judiciary's view of the Federal Arbitration Act. The decision struck down the law and permitted a cellphone provider to bar consumer class actions.

The corporate parties want the rationale applied to their use of class waivers in employment. And until *Epic Systems*, that is exactly what they got.

The Fifth Circuit overturned the NLRB's view that the class waivers obstruct employees' right to act collectively under the National Labor Relations Act, and therefore violate the nation's labor laws. It did so in a challenge to the first opinion that the NLRB issued stating its position, which has become synonymous with the issue. See *D.R. Horton*, 357 NLRB No. 184, 2012 WL 36274 (Jan. 3, 2012)(PDF download link at http://1.usa.gov/1IMkHn8), enforcement denied in relevant part, 737 F.3d 344 (5th Cir. 2013)(Graves, J., dissenting)(PDF download link at http://bit.ly/1XRvjrM), reh'g denied, No. 12-60031 (Apr. 16, 2014).

But the ruling applies only in the Fifth Circuit, as well as other circuits that have followed its lead in rejecting *D.R. Horton*. That also includes the Eighth Circuit and, as part of the late summer class-waiver activity, the Second Circuit.

The NLRB ruling isn't restricted to union members, but also applies to workers at most non-management jobs who might band together and organize against their employer, or join together for a class action lawsuit.

For their part, the plaintiffs want to be able file class-action suits, and not be forced into individual processes.

Epic Systems, the first federal circuit court case to back the NLRB and the plaintiffs' view, came out of the Seventh Circuit. *Lewis v. Epic Systems Corp*., No. 15-2997 (7th Cir. May 26, 2016) (available at http://bit.ly/1U8lhTW). *Morris v. Ernst & Young LLP*, No. 13-16599 (9th Cir. August 22, 2016) (available at http://bit.ly/2bqiU0k) followed just after the Supreme Court granted Epic Systems an extension until last month to file a cert petition requesting review.

The case the NLRB shot back at the employers with in its Supreme Court filing, *Murphy Oil*, is a Fifth Circuit case that originally followed and echoed the Washington, D.C. agency's 2012 *D.R. Horton*, and which met the same fate of being overruled by the appeals court. The NLRB in *Murphy Oil,* like defendant Epic Systems, had been granted a filing extension until September for its cert petition by the Supreme Court.

While the *Epic Systems* cert petition was being prepared and the *Morris* decision was pending, a late summer Second U.S. Circuit Court of Appeals argument over class waivers and arbitration in employment kicked off the flurry of activity, which spanned four weeks. The case, *Patterson, et al. v. Raymours Furniture Co.*, immediately figured in the three early September Supreme Court petitions.

But it probably won't make much of a difference in settling the national dispute.

The panel's chair even said so during the Aug. 19 New York hearings about a mandatory pre-dispute employment arbitration clause maintained by the Liverpool, N.Y.-based parent company of Raymour & Flanigan, a 70-year-old furniture store chain in seven Northeast states.

Circuit Court Judge Gerard E. Lynch wondered aloud whether significant action by his panel and the full Second Circuit would be futile, since the circuit split already existed on whether the use of class waivers requiring arbitration violates the National Labor Relations Act's protections for workers to band together to help their cause.

Lynch and his two fellow panel members appear to have known where they were going, though they had no way of knowing how big a presence the issue would soon become on the Supreme Court's request list.

The Second Circuit panel didn't waste any time re-asserting its view on the circuit courts' split in the wake of the argument. But first, *Morris* was handed down by the Ninth Circuit on Monday, Aug. 22, just three days after the *Patterson* oral argument.

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