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Occam's Razor Unlocks Success in Mediation

By Greg Derin
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We all have indelible memories from our youth. One of mine comes from 10th grade gym class. I was lying face down on the trampoline looking toward the edge where the coach bent down to engage my gaze. He was a kind and patient man, who knew his students well. "Derin, do you know your problem? You think too much."

There are times which call for action. The trampoline required intuition, not analysis. Days before proposing the Declaration of Independence, John Adams wrote the Attorney General of Massachusetts: "Some people must have time to look around them, before, behind, on the right hand, and on the left, and then to think, and after all this to resolve. Others see at one intuitive glance into the past and the future, and judge with precision at once. But remember you can't make 13 clocks strike precisely alike at the same second."

Mediators often find parties paralyzed by indecision as they confront what appears to be a blizzard of issues, facts and choices. The complexity can be compounded as John Adams found when accommodating the interests of multiple decision-makers. By analogy, I am reminded of a principle first popularized by the 14th century English philosopher and theologian William of Ockham, which has come to be known as Occam's Razor. At the risk of distortion, the principle has been distilled to the notion that often the most uncomplicated explanation for a phenomenon is the best one.

When negotiating, parties seek clarity and an understanding of motivations. They fear leaving money or opportunities on the table, being outmaneuvered or embarrassed. Why is someone asking for certain concessions, making a damage claim or offer, demanding a certain payment schedule or trade-offs? Why is a counterpart offering multiple alternatives?

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Doctors speak of the "Zebra"—the notion that one should reject esoteric diagnoses when common explanations fit a patient's symptoms and are a more or equally likely cause. As Theodore Woodward famously said, "When you hear hoof beats, think of horses, not zebras." As with my trampoline experience, our decision-making is often impacted by our cognitive biases. Among these, too many alternatives can create "choice overload" and make decision-making difficult and the final choice less satisfying.

As Daniel Kahneman explained in "Thinking, Fast and Slow," individuals have two systems for accessing information: fast, intuitive thinking based on experience and expertise, and slow "effortful" thinking when intuitive results are not available. The first system is automatic, the second more controlled. A good mediator will bring to bear his expertise on the system one thinking of parties and counsel, which is dominant in decision-making, and influence rationality in system two thinking, to help parties reach conclusions by getting beyond purely emotional and impulsive reactions.

How can counsel assist in overcoming the tendency to over-analyze issues or act impulsively during settlement negotiations?

First, preparation. Engage in a thorough review of a client's needs and the relevant data and requirements. This may require a detailed damage analysis, tax consultation, review with business managers and financial advisors regarding the structure of potential options. It also involves the accumulation and analysis of as much data regarding a bargaining adversary as is relevant to a decision. Even in a strictly distributive bargain, each party should formulate in advance a point of view regarding the "reservation price" of the other side—that is, the worst deal they are anticipated to accept during the negotiation. Neither party will have complete and accurate information as to their counterpart's reservation price, but coming prepared with as much intelligence as possible will lay a good foundation for negotiation.

Second, honest evaluation. A thorough and honest evaluation of the strengths and weaknesses of one's case is required. Whatever the dictates of our desires, one's case is only as good as the facts and law justify. As Aldous Huxley observed "Facts do not cease to exist because they are ignored." Confronting realities late is a strategy, but not one that simplifies the process. Good mediators are invaluable in this process, even if the parties have prepared well. Armed with decision trees and training in cost-benefit analysis, a mediator can focus parties on relevant considerations, and relieve the pressure on counsel. Cases transform from filing to resolution. Mediators can bear the burden of evaluating settlement values, rather than placing the entire load on advocates.

Third, draft a form settlement agreement. This accomplishes multiple purposes. Drafting an agreement to execute if the matter is resolved at mediation helps a party identify and review the relevant issues to assure that they are covered when analyzing options, as well as resolving them in the dispositive settlement document(s). If exchanged in advance with opposing counsel, when counsel can engage in advance negotiation of some issues, the process can build momentum toward settlement and avoid surprises.

Fourth, simplify. Agree with opposing counsel to exchange briefs; in the brief and on the day of the mediation, follow the concept implicit in Occam's Razor and be transparent and straightforward. Laurence Peter famously said that "Some problems are so complex that you have to be highly intelligent and well informed just to be undecided about them." If you present volumes of material and obfuscate the central issues and evidence, the result will be indecision and a lack of trust.

Fifth, be attentive and flexible. Listen with respect to the interests and point of view of an opposing party, being attentive to their needs, and show flexibility. One need not agree with an adversary to engage with respect, attentiveness and flexibility. When all litigants do so, there is always movement toward resolution. As noted above, however prepared one tries to be, the information one begins a mediation with is always incomplete and/or inaccurate. Listening attentively not only demonstrates respect and seriousness but affords the opportunity to show flexibility without fear of appearing weak—one is merely responding to changed circumstances and new information.

Sixth, commit. Everyone comes to mediation to make a deal. No one wants to leave worried that they have missed an opportunity or been taken advantage of. As complex as you believe a case to be, you know that you have a clear story to tell the trier of fact and will do so without extraneous bells and whistles; why encumber the decision-making process unnecessarily. So, stop second guessing and commit to a solution after you have tested the available options and determined what seems "good enough." Having done the research, tested the waters, communicated effectively, and controlled expectations, everyone will have a better night's sleep.

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