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Mediating hard cases: Managing human elements in commercial disputes

Effective commercial mediation requires recognizing and managing the human elements – emotions, histories, biases and interpersonal dynamics – that can either facilitate or impede settlement, rather than focusing solely on financial and legal positions.

By David L. Carden

Commercial mediations rarely begin with a common session that allows the parties to explain their respective positions. The general belief is that common sessions serve no purpose, that little, if anything, will be added to what already has been provided in their mediation briefs. The strong preference is to get on with the negotiation, exchanging numbers as quickly as possible in an effort to reach a settlement. This approach is understandable. It's true that there is usually little more to be said in a common session about the parties' respective legal positions, but it's also true that there's often more to commercial mediations than numbers.



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Collateral forces

Mediators of commercial disputes must be prepared to identify and manage a collection of collateral forces that can affect the mediation. These include the parties' and counsels' emotions, their personal histories, their personal and cultural sensitivities and insecurities, their inclination to import past experiences that have little or no relevance into the mediation, their use of heuristics or cognitive "short-cuts" to understand the dispute and direct their actions, and the expectations and demands of superiors and management who often aren't present. These "human," non-monetary elements are usually obvious when negotiating personal, social, political, religious and cultural conflicts, but they are also present in commercial dis-

putes. We may think of business as "simply business," but it isn't always that simple.

Human elements can, and usually do, have a dramatic effect on the ability to settle commercial disputes. Many mediators are aware of these forces, but it can be difficult to know what to do about them. For this reason, some don't even make an attempt to identify and address them, believing they cannot be known, or if known, cannot be managed.

Instead, mediators concentrate on the commercial aspects of the dispute, focusing exclusively on negotiating a resolution based on matters within the four corners of the case. The result is that some commercial mediations amount to little more than an effort to find a number the parties will accept. When it works,

it reinforces this approach. But when it doesn't, the reason may be the mediator's failure to identify, address and manage the human elements that are present.

Human elements

The human elements fall into two broad categories: those that can be used to enhance the possibility of parties resolving conflict, and those that can impede their chance of doing so. Elements that enhance the possibility of resolving disputes include empathy, a foundational desire to be fair, and an ability to contextualize one's own actions or those of their businesses in more than financial terms.

Human elements that can impede the effort to resolve conflict include anger, feeling disrespected, perceived

self-interest, unrealistic commercial expectations, personal insecurities, historic misunderstandings, and the heuristics we all use to understand the world and our roles in it.

The mediator's challenge thus becomes how to identify and encourage human elements that enhance the possibility of reaching a resolution and minimize those that do the opposite. Fundamentally, this requires a process that identifies, as much as possible, the human elements present, giving the mediator an opportunity to decompose those that are impediments and foster those that enhance the understanding necessary to reach a resolution. In other words, merely reading mediation briefs, knowing the law and the parties' damages theories, and overseeing a financial negotiation

will not be enough to address the human elements inherent in many commercial disputes.

Hidden features

The process should be designed to enable the mediator, and the parties and their counsel, to look beyond the legal and economic landscape of the dispute to find the hidden features that either will derail the mediation or make settlement more possible. Examples of these hidden features include the following:

- The space and time parties need to reflect, understand the dispute, and come to a decision;
- the cultural norms, approaches and communication styles involved;
- bottlenecks that make reaching a resolution less likely, including a party's or counsel's resistance to the mediation, power imbalances between and among the participants, and resistance to the process and rules established by the mediator;
- the capacity for, and interest in, communication, empathy and problem solving;
- capitalizing on the "social" capital that can be created when parties identify with one another and their respective positions and challenges;
- being attentive to the propensity for problems to attenuate over time.

Not all of these will be factors in every mediation. But each of them, and many others, if seen and addressed, can be useful in moving a mediation to a successful conclusion.

Safe environment

What can a mediator do to identify these features and use them to reach an accord? The answer involves the creation of a safe, trusted environment within which to exchange information, making it more possible for the human factors that will enhance the chance of settlement to come to the fore. Here are twelve suggestions on how a mediator can create such an environment:

- Recognize, and embrace, without arrogance or abrasiveness, his or her authority in the room, while also being accessible and empathetic.
- Recognize that there are at least five mediations happening simultaneously: 1) the one between or among the parties; 2) the one between the mediator and the parties' respective counsel; 3) the one be-

tween counsel and their respective clients; 4) the one between the parties' representatives and their management; and 5) the one between the parties' businesses and the outside world, in which settlement may impact their competitiveness and reputations. If there is insurance coverage, there also is a mediation between the carriers and their insured.

- Recognize that these multiple mediations require the use of his or her authority to empower the participants, including strengthening the position of counsel with their respective clients, and the position of the parties' representatives viz a viz their superiors and management.
- Host a pre-mediation group meeting with counsel for all parties with the goal of beginning to understand the human factors at play that aren't included in the mediation statements.
- Speak privately with counsel for the parties with the same goal in mind.
- Consider speaking privately with the parties to the same purpose, first taking advice from counsel whether doing so would be productive.
- Encourage presentations by the parties in a group session at the beginning of the mediation that will allow the parties to introduce themselves, summarize their personal histories, provide background on their respective businesses, and, where appropriate, how the dispute has affected them personally, or has impacted their businesses.
- Encourage counsel to make presentations on the dispute, including the relevant law, damages and the defendant's ability to pay a settlement or judgment.
- Conduct private conversations with the parties and their counsel, and – with counsel's permission – with the parties alone, when it appears something is impeding progress.
- Convene group meetings with the parties and their counsel during the mediation when there is need to clarify various positions being taken and points being made.
- Create opportunities for the parties and their counsel to interact in ways that are unrelated to negotiating the dispute, such as during lunch or scheduled coffee breaks.
- Refrain from rushing the mediation, allowing it to develop a rhythm in which the parties and their counsel do not feel they're being rushed.

These factors create the space and time needed for the parties to be seen and heard. They have as their objective the building of a relationship of trust between the mediator, the parties, and their counsel. When such a relationship exists, it is more likely a mediator will be able to use the human elements that enhance the chance of settlement and avoid those that make settlement less likely.

Controlling the mediation

But as mediators know, most counsel and their clients are of the view that some, or all, of these techniques are a waste of time. Few are attuned to the underlying benefits they offer, believing they have little, if anything, to do with the negotiations at hand. This should not be surprising, as most litigants are unaware of the human elements the mediator might be trying to decompose and utilize to encourage a settlement. If and when they are aware of them, they often believe nothing can be done about them. As a result, they seldom are part of the process.

This presents mediators with a choice – accede to the positions of the parties and their counsel, or choose to define the space and time in ways that allow for the possibility that the human elements can enhance the possibility of a resolution. Said another way, mediators can be in control, or they can cede control.

Mediators who cede control are less likely to be able to settle intractable disputes. It is far better for a mediator, especially when faced with a hard case, to take control of the main mediation and the "collateral" mediations referenced above. After all, the parties got themselves into a dispute; why should they be able to get themselves out of it by following their own instincts?

For the approach I'm suggesting to work, the mediation must be governed by rules that make the common session, and all collateral encounters, safe places to exchange information and positions, and to express emotions and recognize the harm caused by the dispute. The parties and their counsel must trust that the common session – and any group sessions hosted by the mediator during the mediation – won't devolve into an unproductive ex-

change of disrespectful arguments and asides, with questions used to advance positions or score points rather than elicit information.

Finally, the rhythms of negotiations, more than almost anything else, should guide the mediator. The time necessary for human processes – reflection, understanding, empathy, and identification with the other side – is unpredictable, and can't be rushed. This is especially so when parties and their counsel believe they've reached an impasse. Resolving a perceived impasse is like solving Zeno's paradox – a settlement might not be reachable in the time allotted, but that does not mean it can't be reached by continuing in the days and weeks to come.

Conclusion

In summary, utilizing human elements to help resolve difficult commercial mediations is similar to the process of *bioremediation*, which uses a wide range of living organisms to clean up man-made contaminants in natural environments such as soil and water. It does this by utilizing information concerning the relationships between and among organic and inorganic elements to develop processes that degrade or transform what is toxic into something that's benign. Mediators can do the same by identifying, managing and utilizing the human elements present in many commercial mediations.

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