Avoiding the Slow March to the Middle

BY JEROME F. WEISS

The manner in which most mediations are conducted — the way most lawyers and their clients are conditioned to do it — is through a highly positional and distributive process by which the parties and counsel, through the cajoling and arm-twisting of a neutral, begin at extreme and meaningless opposite ends of the spectrum and slowly and often painfully work their way through hard fought compromise, to terms that are somewhere in the middle. This long-standing tradition exists despite considerable teaching and evidence that suggests that a more collaborative and integrative approach is not only more effective, but also something that clients, when they are prepared and engaged, actually prefer.

The idea of zero sum, win-lose has found its way into the DNA of how we mediate, where participants in many instances have come to expect what I call "Trial by Mediation," consisting of the same shortcomings — no, traps — of the advocacy process, with the dominant agenda too often consisting of such negative elements as the need to win, to make someone lose, to exact a price, to validate, to invalidate, to vindicate ... or a combo platter of all of the above. Notions such as truth and untruth and right and wrong are not the ideal that they are cracked up to be. Courtrooms are simply not great places for truth or justice, right or wrong. Law libraries are full of case reporters that reflect one half of the parties being "losers." Just ask the participants, including those who have "won." Nevertheless, this deeply embedded competitive pattern has found its way into how we mediate and negotiate. It shouldn't come as a surprise that some of us lose sight of the unique opportunities presented by mediation and how the format, content, tone and structure should not resemble the oppositional qualities of the courtroom IF we want to take full advantage of the process.

We too often treat the mediation as another step in the litigation and the result is the adversarial "dialogue" of a judicial settlement conference. Our habits are not that difficult to understand. We are taught advocacy and the disputative art from practically our first day in law school and it continues in the litigation process so that by the time we get to mediation, we are so conditioned to this model that more often than not the line between the mediation and a settlement conference is a distinction that is at best, blurred by lawyers and clients and at worst, non-existent. To be clear, the mediation is not a settlement conference, where we rely heavily on the authority and, at times, muscle of the Court to get it done for us. Instead, mediation is supposed to be party directed and dominated, with different tools and strategies. It requires our active and collaborative participation and other pieces of a skill set that we are often not trained for or accustomed to. It can change the dynamic in a way that a judicial settlement conference cannot, like a more rounded and candid discussion in a confidential and privileged environment: things that most people wouldn't dare attempt in front of the judge who may ultimately make critical rulings in the dispute.

Instead of the positional, distributive model that is so commonly used — "you start stratospherically high and we will start absurdly low" — a more collaborative and integrative approach, even though a bit uncomfortable to many because of our legal education, culture and tradition, may be lots less wear and tear and more beneficial to the parties and their interests. Disputants usually prefer it. This observation is supported by evidence that demonstrates that such an approach can attain durable outcomes that parties can be proud of, versus the lawyers' adage that the sign of a good settlement is where the parties are equally beaten up by the process and upset at the outcome. I teach and learn throughout this country and beyond and compare notes with lots of the world's best mediators and most of them do not agree with this latter definition. Rather, they believe that the sign of a good resolution is where the product, process and people are served and that this "triangle of durability" is best advanced by an integrative process where parties clearly have their hands on the steering wheel and where they are at the center of the process, assisted by lawyers familiar with such processes and in touch with their roles as problem solvers. Not an easy task for us lawyers, given the conditions and conditioning I describe; but so much more worthwhile.

Many lawyers try to convince clients that they need to give away their skin to save their bones, when in fact they can preserve both; however it takes work, open minds and eyes of both disputants and their legal representatives to forge the partnerships necessary for resolution. Challenging for the advocates to imagine opponents on the same side of the table — or even around a table — trying to find common conclusions that allow all of us to cross a finish line together. Typical concerns of who wins and who loses shouldn't matter. It is not even the "Win Win" paradigm of Fisher and Ury's *Getting to Yes* that I am suggesting we aspire to, since even that may not be the touchstone we think it is. Rather, I am encouraging the probing of the "urgency to resolve" that many clients want to pivot to in the mediation setting. I see it often: people wanting to put the dispute behind them but being stuck in a process that often promotes differences and divisiveness over the learned discussion needed to leap beyond the competitive narrative.

Noted Michigan mediator and my co-Distinguished Fellow in the International Academy of Mediators, Paul Monicatti, is an advocate of such collaboration. At times of impasse in mediation, when people digress from the partnerships he encourages, he sometimes quotes Henry David Thoreau's *Walden*: " ... the cost of a thing is the amount of life which is required to be exchanged for it, immediately or in the long run." We err if we presume that the usual competitive, distributive, positional manner of going

about resolution reflects the basic model or values that disputants bring to the table ... or prefer as a method of resolving their conflicts. Clients generally do not want to fight about the past. They want to plan a future and we too frequently overlook our own expertise in critical analysis and problem solving in favor of the competitiveness inherent in much of our legal legacy and advocacy.

What can the collaborative approach accomplish that the positional one can not? More information can be shared and in turn, trust built. Likewise, a spirit of cooperation can be established that allows disputants to get beyond a mere restatement of positions which they are unlikely to ever convince each other of. Chances are there will be a decrease in defensiveness and offensiveness (How often have we witnessed the joint session blow up because somebody needs to put on a highly positional "opening statement," where somebody else is invariably insulted?). We can put ourselves in somebody else's shoes and listen with open ears. This is an important point since we can talk about "us" instead of taking the usual positional shots at "them," the latter perhaps good for courtroom persuasion, where strangers get to decide, but not desirable where the party we are putting off holds half the terms of resolution and is seated at the table with us. We can talk about dollars in a meaningful way instead of the usual mindless exchange of numbers with a neutral acting as little more than a water carrier. Our intuition and imagination can flourish and in turn, we can deal more expansively with what might be complicated and emotional issues. While I realize that most mediations by necessity have some positional bargaining, I have seen the "magic" of the more integrative and collaborative model at work.

What might help us have a more integrative and productive mediation? Here are a few tips that I keep in mind when I mediate or prepare people in negotiations and mediations: 1. Utilize the mediator. He/She is more than a water carrier. They should tell you, but if not, ask them what they have in mind. They should be there with the training and expertise in how to model your negotiation and help. Remember, this isn't a judicial settlement conference. 2. Be prepared to talk about risk and uncertainty and not position or opinion. They are the currency of the negotiation and it is important that you understand this. 3. Prepare your client ... and ... prepare your client. They should be encouraged to speak. They often want to. Review it with them, if necessary, since their impression on your opponent might have impact. Preparation also means encouraging realistic expectations and what the risks and uncertainties are. 4. Prepare yourself to work and communicate in a way that helps people understand. The process needs your help. 5. Keep an open mind, knowing that your evaluation may reflect cognitive biases and is still subject to uncertainties and risks beyond your control. 6. Listen. 7. Finally, "compromise" is not a dirty word. It may allow you to control the outcome.

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