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ALTERNATIVE DISPUTE RESOLUTION

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Bruce Merenstein and Carl Schaerf of Schnader Harrison Segal & Lewis LLP express thoughts on the mediation process, from a mediator's perspective.

The Mediation Caucus: Where the Rubber Meets the Road

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ABOUT THE COMMITTEE

The Alternative Dispute Resolution Committee serves all members who use mediation and arbitration to resolve disputes, as well as those who have become mediators or arbitrators in their own practices. The Committee publishes newsletters and is developing as a global resource for our international members, corporate counsel and insurance executives, to offer expertise on negotiating and drafting alternative dispute resolution provisions and on the effective use of alternative forms of dispute resolution.
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The mediation of legal disputes often begins and ends with the parties and their counsel gathered together around a table, with the neutral mediator at the head of the table. At the beginning, the mediator describes the process and the rules that will govern the mediation. The parties or their counsel usually make opening statements, setting forth their respective positions and, often, using the opportunity to air their grievances about the dispute.

At the end of the day (or days), if the mediation is successful, the mediator will oversee the memorializing of the terms of the resolution of the dispute, usually in a memorandum of understanding format, with a formal agreement to follow. If the mediation is unsuccessful, the mediator often will bring the parties back together to discuss next steps and perhaps to clear the air with the hope that the process did not drive the parties further apart and make out-of-court resolution of the dispute less likely.

But the heart of the mediation process is the caucus, the mediator's opportunity to meet separately with each side to move things along toward a resolution of the dispute. Every mediator has his or her own view regarding the proper use of caucuses and how often they should be used, as compared to joint sessions. My own experience as a mediator and my understanding of the dynamics of legal disputes have made me a strong advocate of the mediation caucus. The caucus is where the rubber meets the road. The caucus is where the real work of mediating a dispute gets done. It is where the mediator can assist the parties in achieving an out-of-court resolution of their legal dispute that not only addresses the substantive dispute at issue but often diffuses a tense situation and provides the catharsis and closure that even litigation cannot provide.

The Initial Caucus

Once the introductions are done, the mediator has laid down the ground rules, and the parties have made their opening statements, it is time to get down to business. The initial caucus in a mediation is important for establishing rapport between the parties and the mediator. Although the mediator should attempt to establish a good working relationship with the parties in the initial joint session, the presence of warring factions on either side of the table tends to make the atmosphere tense and limit the mediator's ability to connect with the parties, particularly if he or she has never met them before. By contrast, after the combatants have been placed in their separate caucus rooms, the mediator can more easily develop a rapport with the parties and their counsel, outside the presence of the adverse party.

One of the most important skills for a good mediator is the ability to listen to the parties. The success of a mediation is often directly proportional to the amount of talking the parties do in caucuses and inversely proportional to the time spent listening to the mediator. While it can help put the parties at ease if the mediator comes across as personable and likeable, it seldom advances the ball to spend valuable time listening to the mediator tell war stories or go on at length about his or her views on the dispute being mediated.

The core principle of caucuses in a mediation is the confidentiality of discussions between the mediator and the parties. Most mediators follow the rule that anything said in caucus is confidential, unless the mediator requests and

receives approval from the party to disclose particular information conveyed in caucus to the other side. Some mediators follow the converse default rule: parties are informed that anything they say in caucus can be shared with the other side, unless the party specifically requests that certain information be kept confidential. From my own perspective, the minority view has the potential to destroy most of the benefits of the caucus. It is unlikely that candid discussion, the disclosure of private information to the mediator, and exploration of potential solutions to the dispute will occur in caucuses if parties know that everything they say may be shared with their adversary.

Moreover, when a party knows that the mediator possesses confidential information about the other side's interests, arguments, demand/offer, or willingness to compromise, it can actually induce that party to be more candid and forthcoming about its own case and settlement strategy. Most sophisticated parties understand that, when the mediator possesses such confidential information *from both sides*, the mediator is better equipped to fashion a resolution of the dispute and get the parties to the point where settlement is possible. In this way, the mediator serves as the perfect antidote to the prisoner's dilemma, bridging the information gap between the adverse parties that would otherwise prevent them from reaching a solution that provides the greatest benefit to both parties.

In the initial caucus with each party, it is particularly important for the mediator to allow the parties to speak freely, something that is unlikely to happen if the discussion is not confidential. Outside the presence of the other disputants, a party can vent without creating more friction and animosity that would hinder resolution of the dispute. The mediator also can learn about the real concerns and interests of each party in this initial caucus, but only if the parties are encouraged to speak openly and in confidence. The initial caucus also offers a good opportunity for the mediator to learn each side's reaction to what it heard from its adversary in the initial joint session.

Many mediators try to limit the amount of time spent in these initial caucuses, particularly with the first party, so as to ensure that neither party feels as if the mediator is favoring one side over the other and to keep parties from losing the momentum and optimism that may exist at the beginning of the process. I don't disagree with this concern, but my preference is to explain to the second party the importance of the initial caucus and to let that party know beforehand that I may spend a good deal of time with the first party. I explain that this is quite often a good thing, as the more time I spend with a party, the more opportunities there are for me to understand and explore avenues of resolution.

On the other hand, a mediator should be careful not to caucus so long with one party that the other party becomes suspicious, loses interest in the process, or digs its heels in deeper. Some down time while the mediator is with the opposing party is good. It offers a party an opportunity to reflect on what has been discussed in the initial joint session (and, later, in caucuses with the mediator), to brainstorm among party representatives and counsel as to possible solutions to the dispute, and to cool down if emotions are heated. But a mediator should watch the clock during these initial caucuses because too much downtime for either party this early in the process can be problematic.

After listening to a party in the initial caucus, the mediator will often offer a candid assessment of the party's arguments and positions regarding the dispute. This is

something that obviously cannot be done in a joint session. Many mediators choose not to offer an assessment (candid or otherwise) on the ground that the mediator's role is to facilitate a resolution of the dispute and not to actively push the parties toward a particular solution based on the mediator's view of the issues. I agree with this concern, but believe it is possible to offer a frank appraisal of a party's arguments and positions without using my view of the dispute as a basis to pressure the parties to compromise. Rather, my blunt evaluation is offered as food for thought, particularly for when the initial caucus ends and I move to the other party's room.

Similarly, in the initial caucus, the mediator may take the opportunity to subtly lower each side's expectations. While parties have no obligation to compromise or reach a resolution of their dispute in a voluntary mediation, the simple fact that they are going through the exercise means that they are probably willing to do so and would prefer to resolve the dispute in the mediation rather than litigate it. Given this reality, a mediator should use the initial caucus to tactfully explain that few mediations end with each side (or either side) obtaining everything it wants or everything it believes it is entitled to receive.

The major advantage that litigation (including arbitration) holds over mediation is the possibility of hitting a home run: a plaintiff obtaining every dollar it seeks in damages or a defendant obtaining a complete defense verdict on liability. Of course, parties often obtain less than they seek in litigation, and there is always a risk of striking out: a plaintiff getting nothing or a defendant getting a judgment against it for everything plaintiff seeks. But in mediation, a home run is virtually impossible to obtain, and this should be made clear to the parties, in the initial caucus, in a way that does not discourage them from continuing to seek a resolution that is satisfactory to both sides.

Subsequent Caucuses

Seldom will a dispute get resolved after the initial caucuses. More often, a mediator will spend the bulk of his or her time in shuttle diplomacy between the two factions. These subsequent caucuses also offer an opportunity for the mediator to establish a rapport with the parties and gain their trust, which are often prerequisites to a successful resolution of the dispute. While a mediator should not denigrate or discount the arguments of one side in discussions with the other, a mediator can in many circumstances express empathy with a party's position as part of the establishment of rapport and a good working relationship. By doing so in caucus, the mediator can avoid alienating the adverse party.

In addition, in these subsequent caucuses, the mediator can use additional tools in the mediator's arsenal for moving the parties toward a common point where agreement can be consummated. For example, the mediator can offer comments that a party's attorney might not feel comfortable saying to the client. The mediator can point out weaknesses in a party's claims or defenses, or the reasonableness of an offer or demand from the other side. As a neutral, disinterested party, such critiques or analysis from the mediator may be more palatable than if the same comments were made by a party's own counsel. It goes without saying that such comments are better made and are likely to be better received in a private caucus than in a joint session.

In the caucus, the mediator might also pick up on any conflicts between a client and its counsel, or among various client representatives if there are more than one

present. An astute mediator will look for the underlying cause of these conflicts if they appear to be one of the obstacles to resolving the dispute. This is obviously easier to do without the adverse party and its counsel in the room.

By the same token, the mediator can more easily deal with a problem client in caucus, even reading the proverbial riot act to a client who appears intransigent and unwilling to even consider possible solutions to the dispute. Of course, in the mediation context, the "riot act" largely consists of warnings about the costs, risks, and distractions of litigating the dispute rather than resolving it amicably through mediation.

The caucus offers the mediator an opportunity to explore creative solutions for resolving the dispute. The mediator can offer hypothetical proposals to test a party's attitudes, positions, and willingness to compromise, without necessarily forcing the party to commit to a new offer or demand. Parties and their counsel also can explore out loud with the mediator possible solutions, without the fear that by discussing those solutions they are committing to them. Such brainstorming, in confidence and without the adverse party in the room, can be invaluable in finding creative solutions to legal disputes.

While the primary advantage of the caucus is the ability to speak confidentially, the mediator will often ask permission to convey certain information revealed in the caucus to the other side. Parties frequently feel more comfortable having the mediator convey certain information, whether it be a concession or assertion, during the mediator's shuttle diplomacy rather than in a joint session, because it can be done tactfully, productively, and unemotionally. Using the mediator this way has the advantage of avoiding lack-of-information pitfalls without creating opportunities for posturing or tit-for-tat responses, as might happen in a joint session.

Although parties usually provide the mediator with information prior to a mediation session to educate the mediator about the dispute, the compressed time frame of most mediations of legal disputes necessarily leaves the mediator with questions or even misconceptions about the dispute, the facts, or the parties' arguments and positions. The caucus offers the perfect opportunity for the mediator to seek clarifications or explanations to fill in his or her understanding of the issues.

The initial caucus and earlier caucuses generally tend to be longer than later ones and the time spent with each party typically shortens as the mediation progresses and more time is spent trading offers and demands than discussing the substance of the dispute. Yet, this is not always the case. Subsequent caucuses can sometimes be just as long as the initial ones, as the mediator works with one of the parties to break an impasse, come up with a creative solution to a seemingly insolvable problem, or give additional opportunities to provide information, vent anger or disappointment, or simply talk through the issues. As noted above, this isn't necessarily a problem, but an attentive mediator will at least take occasional breaks from a long caucus with one party to check in with the other party and assure it that progress is being made and that the party left by itself has not been forgotten. In this day of ubiquitous connectedness, a party waiting for the mediator to return from a caucus will typically be multitasking in any event, so the days of parties wasting time and figuratively twiddling their thumbs while waiting for a mediator to caucus with them are largely in the past.

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In short, the real work of resolving legal disputes through mediation occurs most often in the caucuses in which a mediator can use his or her skills — patience, good judgment, empathy, rationality, optimism, honesty, sincerity, creativity — to find the common ground that almost always exists between warring factions. These skills and all the tools in the mediator's arsenal are best used in the private setting of a caucus in which the mediator and the parties can talk candidly and confidentially, making a voluntary resolution of the legal dispute more likely.[1]

[1] *Source note*: In addition to drawing on the author's own experiences as a mediator and advocate in mediations, he obtained invaluable insight from a number of sources, primarily Bennett G. Picker, *Mediation Practice Guide: A Handbook for Resolving Business Disputes* (2d ed. 2003); Dwight Golann, *Mediating Legal Disputes: Effective Strategies for Neutrals and Advocates* (2009); Richard M. Calkins, *Caucus Mediation - Putting Conciliation Back Into The Process*, 54 Drake L. Rev. 259 (Winter 2006); and John W. Cooley, *Mediation Magic: Its Use and Abuse*, 29 Loy. U. Chi. L.J. 1 (1997).

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