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How Mediation Works, Part Three: Exploring Options - August 25, 2009

by Joe Salama

Mediation often works because it has to work, because the alternative, going to trial, is too costly and too risky. This is usually the motivating factor which caused the parties to consider mediation in the first place.

In any negotiation, and mediation is no exception, the parties must always consider what would happen if the negotiation fails altogether. The term "BATNA" (Best Alternative To a Negotiated Agreement) was popularized in the 1981 book Getting To Yes by Fisher & Ury, and remains an important concept today. The landscape of possible outcomes, including the point of total disagreement, must be mapped before the parties can be expected to perform an intelligent analysis of which path they should undertake.

Among the many other points on the map is the point that approximates the expected outcome if the conflict proceeds to trial. Each party, of course, will have their own estimate of where their point will fall, which will be filtered through their respective attorneys and reflect their versions of the underlying facts, their confidence in their case, and perhaps some posturing. It is essential to have a mediator who is experienced in the area of law of the underlying dispute so that the mediator can help plot a point objectively based on his/her experience in litigating these types of cases. A retired judge who has presided over these types of cases, and is now a mediator, would be even better in predicting a realistic outcome.

But the mapping should not end there. There are only three points on this map so far: each party's BATNA, and the mediator's estimate of the likely outcome at trial. Most mediations proceed with just these few points plotted on the map, and very little effort is put into exploring other options before the parties are asked to begin compromising their positions. Faced with the alternative of an expensive and uncertain trial, the parties are often forced to accept an unsavory settlement.

I believe that a mediator should present the parties with as many potential outcomes as possible that satisfy the parties' interests. Proper advance research into

other jurisdictions and old caselaw, combined with a little creative thinking, will often reveal a variety of other options the parties have not yet considered. The parties themselves are often the source of additional solutions, as discussed more thoroughly in my article How Mediation Works, Part Two: Expanding The Problem. The idea is to remove the inquiry from a linear analysis of BATNA vs. trial, and turn it into a multitude of combinations of possibilities that get all the parties thinking about different resolutions that have never been considered. The exercise of plotting the points onto a whiteboard will often cause one of the parties or the attorneys to suggest an option that is the start of a satisfactory resolution. Although it remains a fact that if the parties do go to trial, a specific outcome may be more probable than others, perhaps one of these newly discovered outcomes is preferred by all parties. As a mediator, I consider the threat of trial a last resort perspective because it typically results in a settlement that the parties will regret entering into.

All mediators work differently, and it is up to each party to ascertain which type of mediator best fits their needs and/or their client's needs. It would be a mistake to walk into a mediation without knowing anything about how the mediator works, because if it turns out that the mediator's style does not fit your conflict and the case does not settle, you may lose your only opportunity to get the other party/parties to the negotiation table.