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Mediation advocacy

MEDIATION INVOLVES A FINANCIAL INVESTMENT DECISION RATHER THAN A LEGAL DECISION. ANCIENT SOCRATIC SKILLS WITH A MODERN UNDERSTANDING OF BEHAVIORAL ECONOMICS AND INVESTMENT DECISION ANALYSIS ARE USEFUL TO THE PROCESS

On the way to trial there is mediation. Because cases traditionally had been settled by direct negotiation between counsel, mediation is widely thought of as another form of negotiation.

Mediation is more than negotiation. It involves advocacy that can be unique to mediation but is advocacy nonetheless. Different than trial advocacy, with its focus on legal argument, mediation advocacy, in addition to negotiation techniques, includes a range of knowledge and skills used in other contexts, including behavioral economics, data analytics, and investment decision analysis.

The mediator's presence as a good faith neutral also enables the use of settlement techniques not present in direct negotiation. These methods are available in mediation because its goal is not a decision on who wins, but the management and elimination of risk.

For mediation advocacy it may be helpful to consider new understandings of behavior, and old understandings of persuasion. Done well, mediation can produce sound and even satisfying results for both parties.

The Socratic Trialogue and behavioral economics

The Socratic Trialogue is a description of effective communications between each counsel and the mediator. Its principles are:

Don't argue. Ask questions.

Argument begets argument and drives parties apart. A thoughtful inquiry calls for a thoughtful response. A response that is thoughtful advances risk elimination. A response that is not thoughtful hurts the credibility of the responder.

The source of this understanding is not modern behavioral economics, but ancient philosophy.

It is worth re-reading Plato's Republic. Socrates is not usually a harsh interlocutor. He is not Professor Kingsfield in the movie "The Paper Chase," with its humiliation of students. Socrates most often just asks another question. He invites his colleagues to think through an issue, and though he does point out contradictions, his basic method is to guide them to a conclusion he wants them to reach.

Socrates knew the most powerful form of persuasion can be guiding a person to take ownership of the final step.

That knowledge illustrated by Socrates is bolstered by modern Behavioral Economics, and the work of Amos Twersky, and Daniel Kahneman and Richard Thaler, for which Nobel Memorial Prizes in Economics have been awarded.

The basic insights are known as the confirmation bias, the backfire effect, prospect theory, and the primacy of loss aversion. Put in the most straightforward way, they all come together in basic understandings. People do not receive facts and evidence objectively. The preexisting beliefs people have color the effect of information. With confirmation bias, information received will be used to reinforce existing belief. Because of the backfire effect the more assertive a view contrary to an existing belief is, the more it will reinforce the existing belief, even if the asserted facts contradict that belief.

The existing explanation for the backfire effect is that an assertion contrary to an existing belief is perceived by the recipient as an attack on the recipient's integrity in having the original belief. The recipient will disbelieve the contrary evidence to protect the belief in the feeling of integrity.

Prospect theory is that decision makers balance potential gains against potential losses, but an aversion to loss has been shown to be the stronger emotion. Experiment after experiment has confirmed the fear of losses is greater than hope for gains.

What does this mean for mediation advocacy?

A strong opening position

Starting with a strong opening bargaining position is not inconsistent with techniques of the Socratic Trialogue, with each of the parties asking questions and empathizing with and understanding the response.

The questioning should start with a single, less emotional, not decisive issue. The goal should be, through the mediator, to get the other side to begin to consider complexities of a part of the case, not an entire rejection of the case. A process of reexamining set beliefs can start, but it starts slowly. Once it starts, it can begin a positive process of objective appraisal of strength and weaknesses of each party's case. This is especially true if the process of responding to and asking questions cultivates an appreciation of the position of opposing parties and of the mediator.

The perception of the risk that needs to be managed can be helped by the growth of data and judicial analytic tools. Newer search tools are providing more information about how individual judges and juries may reach decisions if the dispute moves to court resolution. The company Lex Machina began the process with its data analysis of the difference in rulings on issues in patent cases between different federal trial courts. A predictive value could be assigned to the outcome of issues before a particular judge.

That procedure has been extended and continues to be extended on a virtual daily basis, by a variety of search engines to analyze how an individual state court judge has ruled and is likely to rule on issues. For jury analysis there is now inexpensive internet technology that allows mock juries to be assembled and guidance gained from their responses to

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various video presentations and questions. The technology permits a large number of variables, in jury composition and presentations and questions, that otherwise would have been prohibitively expensive.

Of course, these tools can never give a definitive answer. But they expand the range of perceived risk, and by doing so make mediation techniques for risk elimination more attractive.

Investment decision analysis

Following a greater understanding of case strengths and weaknesses, framing questions in the form of an investment decision rather than legal argument can lead to behavioral decision making that helps settle disputes.

When the defendant makes the offer, it should not be accompanied by arguments for why the plaintiff may lose, and why the plaintiff's case is weak. If defendant does that, the arguments will create a backfire effect, reinforcing the plaintiff's belief in the strength of its case.

Instead, the offer could be cast as an investment decision in a way that would call in the principle of loss aversion. The mediator should be requested to ask the plaintiff the following question: If this weren't your case, but somebody else's, and you had the offer (e.g., $1,000,000) in the bank, would you invest it in the other case? In reality, the offer is effectively plaintiff's money when it is made, as though it were in the plaintiff's bank account.

Now the plaintiff starts to think about alternative uses of the money. Will it fund family members' education, provide for an investment, or help with retirement? Or would the plaintiff invest in the other case? Focusing on the fact the money is the plaintiff's, and that a rejection will take it away from plaintiff casts the decision in terms of loss aversion and changes the perspective.

The investment decision analysis also should lead the plaintiff to request the mediator to ask the defendant a similar, though somewhat more complicated question: If this were not the defendant's case but someone else's, would the defendant, in return for a single premium insurance payment in the amount of the plaintiff's demand, undertake all defense and indemnity in the case going forward, and accept the financial risk of misjudging the full defense and indemnity costs and being liable for the excess?

70% chance of win = 30% chance of loss

So, if the plaintiff's demand were, for example, also $1,000,000, would the defendant, for a single payment of $1,000,000, underwrite the full risks if the case were someone else's? As a matter of financial analysis, even if the defendant believes there is a 70 percent chance of winning on liability, that means there is a 30 percent chance of defendant losing.

The risk question is: a 30 percent chance of losing what? A judgment, plus out of pocket costs, plus opportunity costs? This is somewhat different than a standard decision tree. It does not ask for a legal risk analysis of the chance, for example, of a motion for summary judgment being granted, an expert's testimony being excluded, or a finding of negligence or fraud at trial. It focuses the loss question on financial risk analysis, which has to start with damage analysis risks. What is the chance the total damage cost will exceed the amount of the demand?

Whenever the plaintiff's demand is less than the amount the defendant would accept, on a risk analysis basis, to underwrite a full defense and indemnity of the case going forward the demand should be paid. It is a different analysis, focusing on loss aversion, and makes it far more likely to be accepted.

A financial, not legal decision

The parties do not make a legal decision. Courts make legal decisions. In mediation the parties make a financial investment decision and keeping the focus on that framing of a decision leads to the loss aversion that aids settlement.

The focus on investment decision analysis also helps in reinforcing that the legal issues do not have to be resolved for the interests of the parties to lead to an agreement. The legal issues may have to be discussed as part of a process in which parties should expect a mediator familiar with the issues to be able to discuss them at various levels. But the legal issues often can be made irrelevant. Insistence on discussing them can be a barrier to resolution based on interests and investment analysis.

For example, in an environmental lawsuit a main legal issue may be whether a project requires a full EIR or simply a negative declaration. While that issue may be critical in a resolution in court, it is not necessary to decide it for the mediation to resolve the lawsuit. The interest of the parties may not be that the legal issue be resolved, but what specific environmental review is appropriate and at what costs to meet the interests of each party. A customized environmental review can then be agreed upon. Too extensive an argument about the law can get in the way of the parties' interests. A focus on interests combined with investment decision analysis can lead to resolution not unacceptable to both parties.

We see the same kind of thing with issues like the statute of limitations when it is an issue in litigation. The parties should expect a mediator who knows the cases and law well enough to help with evaluating the risks, but though it might be legally decisive in court, does not have to be decided in the mediation. Once the analysis of its risks has been done, it can simply be part of the risk analysis in settling the entire dispute.

Techniques available only in mediation

The reason mediation often works better than direct negotiation is because the neutral can urge each party to undertake the investment decision analysis in ways that opposing parties could never push each other to do. That also can be done by a set of processes available to the mediator that are not available in direct negotiations.

The mediator may simply act in the beginning as an intermediary

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communicating demands and offers that would also be present in direct negotiation. Each party goes through the process of deciding what should come first, plaintiff's demand or defendant's offer. Each party has a goal to reach, and once the negotiation process starts, seeks to reach a set goal.

But that may only go so far. Then the mediator has a set of processes that are not available in direct negotiations: bracketing, the black box, and if the parties agree, and at the right time, the mediator's proposal.

Bracketing as a tool

Bracketing is the mediator asking each party for a high-low bracket of numbers of possible acceptable settlements. This is something the mediator can ask for that is not easy to obtain in direct negotiations. It is most effective when it is done within a "black box" – in mediation a discussion between a party and the mediator in which the mediator agrees nothing discussed will be communicated to the other side. The mediator of course presses the party on the arc of the bracket, but using mediation advocacy, counsel for the party can press the mediator on the mediator's views as well. It involves a confidential dialogue with a neutral that will never be communicated to the other side. If the mediator does this with both sides, each in its own black box, the mediator will then know the contours of each party's willingness to settle.

Only the mediator will know if the brackets overlap at some numbers. Whether or not they do, the mediator may sense when a mediator's proposal would be helpful. The parties may suggest, or the mediator may ask for authority to make a mediator's proposal. Many mediators will be very reluctant to make a mediator's proposal they are not confident will be accepted. The mediator in confidential caucus may ask each party for its confidential reaction to a number if it were a mediator's proposal so the mediator can gauge the possibility of success. The key is the trust of each in the mediator.

The mediator's proposal

A mediator's proposal often results in a settlement number that might not otherwise be achieved. Why does the mediator's proposal work when direct negotiation may not? Because a party might be unwilling to accept an offer or demand made directly by the opposing party, since that demand or offer may cross a red line or go beyond granted authority. It is easier for counsel to advise and a client to consider the acceptance of a mediator's number than for counsel or client to agree to a demand or accept an offer only made by the other side. The mediator's number implicitly includes a judgment on what the settlement should be and provides cover to a counsel or client otherwise reluctant to propose or accept that number.

If the mediator's proposal is brought forward, and one party says no, that party is not told and does not know whether the other party said yes or no. It is difficult, but not impossible, for the mediator to resume the mediation if both parties say no, or if one party says yes, and the other no. The mediator will have made a misjudgment; the proposal will have failed. But good mediators never give up, and even if the matter does not settle during the scheduled mediation will continue calling the parties to attempt to obtain a resolution.

It is important the Socratic Trialogue continue. With each confidential caucus, counsel should ask questions of the mediator as well as answer the mediator's questions. To the extent dialogues are mutual, with questions and answers from all participants, it is possible at its best to develop a sense that all are working together on a joint project.

There is an irreducible amount of ignorance about the future. No one can predict it except within a penumbra of risk. No one can know what the alternative to settlement would have been. But the process properly done can lead all parties to understand a wider risk of loss in not settling than they understood when they began the mediation.

When this happens, the observation that a good settlement is one both parties are unhappy with may not apply. Both parties may come to see the settlement as an avoidance of a larger risk of loss. We know the importance of loss aversion. The Socratic Trialogue, using the insights of behavioral economics, may lead to a genuine feeling by the parties the mediation has done its job in an unexpectedly satisfying way.

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