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The Mediation Session: Tips on Strategy for Caucuses

This is the ninth article in this series on mediation advocacy. The [eighth article](#), published August 31, discussed the advocacy strategy for the opening joint session.

Judy Weintraub and Harrie Samaras

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This is the ninth article in this series on mediation advocacy. The [eighth article](#), published August 31, discussed the advocacy strategy for the opening joint session. The article continued a scenario in which the parties, Widgetronics and DesignMetrics, entered into a contract containing a dispute resolution clause and became embroiled in a dispute over Widgetronics' alleged wrongful termination of the contract. During the preliminary conference call with the mediator, the mediator reviewed the process she would be utilizing at the mediation, starting with a joint session and then moving to private caucuses with each party. This article provides tips on effective advocacy for those caucuses.

While the purposes of a caucus can vary, they often include: protecting proprietary or personal information, brainstorming ideas for presenting a proposal, reality testing, discussing confidential business interests, exploring options and venting. Although caucuses are not part of every mediation (for example, mediators use caucuses less frequently in family and community mediations), many mediators do use caucuses extensively, particularly in commercial mediations. When the mediator and the parties plan to rely more heavily on caucuses, counsel should understand what to expect and how best to use that time to make progress in settling their dispute.

What Happens in Caucuses?

During the course of a mediation session, mediators typically hold several rounds of caucuses that vary depending on whether the caucus is in the early, middle or late stage of the mediation, and counsel should have a strategy for each stage. In early stage caucuses, the mediator aims to build rapport and trust with the party representatives and counsel, as well as gain a deeper understanding of the parties' underlying interests, strengths, weaknesses and options. Parties are invited to disclose sensitive details about the dispute that were not presented in the joint session, or possibly the mediation submissions. And parties have an opportunity to express any anger, frustration, hurt or other emotions. After venting their emotions, and feeling satisfied they have been heard, parties are more likely to listen and consider options for resolution. In some cases, mediators will begin to convey settlement proposals at this early stage.

In the middle stage of caucuses, the mediator aims to create momentum toward settlement by focusing the parties on areas of agreement, their underlying interests and the risks of not reaching agreement. After developing rapport with the parties and learning more about the case, the mediator takes a more active role. For example, the mediator is likely to conduct reality testing and to probe more deeply into the party's legal weaknesses, its alternatives to settlement, its risks and the other side's strengths. The mediator also is likely to press the parties for creative options and coach the parties about what might work and not work in the proposals she transmits.

In later-stage caucuses, the mediator seeks to close the gap between the parties to obtain resolution by employing various tools and strategies, such as changing the dynamics by meeting with just counsel or just the party representatives, or engaging in range

bargaining (getting the parties to move to a certain range) or "what if" scenarios ("If I can get them to X, will you move to Y?"). These caucuses are generally shorter and consist primarily of bargaining until agreement is reached. At that point, the mediator may bring the parties back together, or just meet with counsel, to prepare at least a term sheet of the key terms of the settlement.

Effective Advocacy in Caucuses

Counsel's skill in the caucuses is key to reaching a solution that best meets the client's needs. Effective advocacy consists of good preparation and skillful improvisation, as counsel needs to adjust strategies based on the flow of the discussions. To prepare, consider:

- What you want to gain from each caucus;
- What information to divulge at each stage;
- What information you need from the other party;
- What are the likely proposals to make at each stage;
- What your client needs to settle;
- Whether some subset of participants should participate in the caucus;
- The client's most effective role in the caucuses; and
- How to utilize the mediator most effectively.

Mediation offers clients more than just an opportunity for settlement discussions. Clients gain a healthy intangible benefit from being able to express their perspectives and emotions even when the mediation does not result in a settlement. Clients can also play an important role in caucuses — as negotiators, factual repositories, strategic planners and risk assessors. Particularly if the client did not actively participate in the opening joint session, counsel should encourage and prepare the client to do so during the caucuses. When the client's emotions or lack of patience overtake the necessary focus for the mediation, counsel may want to enlist the mediator's assistance (by way of a private conversation) and/or try to direct the client's participation to certain discrete topics and tasks.

Effective mediation advocates understand mediators are not judges with decision-making authority; they are intermediaries with skills and tools to help the parties negotiate a settlement. These advocates appreciate that while mediators are neutrals who cannot favor one side over the other, they can employ the mediator in a variety of ways to further a client's interests, including to:

- Convey information to the other side;
- Cushion the information;
- Obtain information from the other side;
- Explore the other side's reaction to options and proposals;
- Explore hidden interests and issues and develop options related to them;
- Present an option as coming from the mediator (thereby preventing "reactive devaluation" of the proposal by the other side);
- Endorse a proposal (e.g., telling the other side that he or she views the proposal as fair);
- Educate a client with unrealistic expectations;
- Provide feedback about what is likely to work/not work in a proposal;
- Give his or her opinion regarding a proposal to its proponent;
- Coach principals on how to communicate effectively with one another if they meet without their counsel (with or without the mediator) in a joint session;
- Provide suggestions on how to break impasse; and
- Make a "mediators proposal" (usually only as a last resort).

In addition to developing a game plan for the caucuses, counsel needs to prepare the client for the caucuses, by explaining what is likely to happen, the strategy that counsel has developed, the client and counsel's roles in the caucuses, and the need to keep an open mind and be creative and patient. Counsel should show empathy to their clients regarding the emotional aspects of the controversy. They should focus their clients away from the past and toward the future and on the work necessary for the negotiations.

Counsel should also anticipate the questions that the mediator is likely to ask and be prepared to respond to inquiries in each of the following areas:

• **Strengths, weaknesses and probabilities**

What are the strengths and weaknesses of the client's case and those of the other side? What are the estimated probabilities of achieving an adjudicated win and what are the costs of not achieving it or trying to achieve it?

• **Alternatives/risks**

If the conflict is not resolved, what are the practical, actual alternatives for each party (best alternative, worst alternative, most likely alternative to a negotiated agreement) and what are the risks of not settling?

• **Perspectives**

What is driving the controversy? Why hasn't the dispute been resolved? What is needed to reach resolution? What information could be provided by either party that might change the perspective of the other party?

• **Interests**

What are the underlying business and personal needs and interests of each party?

• **Options**

Develop multiple options that your client might be willing to accept for resolution and the rationale for those options, including any supporting objective standards.

In preparing a game plan and participating in the caucuses, counsel should keep in mind the following tips:

- Try to avoid focusing too heavily on the merits of the case. The mediator is not deciding anything, and disputes are rarely resolved in mediation based on the legal merits.
- Establish a relationship of trust with the mediator and be candid.
- Ensure the mediator fully understands the client's case and the factors important to the client in settlement.
- Keep an open mind. Be prepared to listen to points raised by the mediator and to respond to points raised by the mediator from your opponent.
- Make sure the mediator understands what information disclosed in the caucus the mediator can share with the other party, and what should not be disclosed. You may be willing to allow the mediator to disclose certain information at a later time, or under certain conditions, such as if the other party is willing to provide certain information you have requested.
- Be patient and trust the mediator. Mediation takes time. Expect that most of the negotiating will take place in the final hours of the scheduled time.
- Keep a pulse on how the client is doing. If the client is getting discouraged, frustrated or impatient, seek help from the mediator.
- Before making a settlement proposal, consider how the offer should be presented. The mediator could present the offer as coming from the attorney, from the client, or from the mediator himself. Or the offer could be presented in a joint session with all participants or with some subset. Counsel should assess the advantages and disadvantages of each choice.

After the caucus with the mediator is over, and while the mediator is meeting with the other party, counsel needs to utilize this time to prepare for the next caucus. This preparation consists of reviewing what was learned, identifying any information desired for the mediator to obtain from the other side, developing additional options, re-evaluating the client's goals and strategies, determining the next offer (and who should propose the offer), and considering whether any process changes should be made. The mediator may also have assigned work to be done in the interim.

At the end of the day, either the parties will have reached a resolution (the day of the mediation or shortly thereafter), in which case the next step is to document their agreement, or they will have reached an impasse. Our next article addresses the groundwork necessary to prepare the settlement agreement, and our subsequent article will address steps to take in the event of an impasse. •

Harrie Samaras is the founder of ADR & Law Office of Harrie Samaras and co-founder of Advanced Business Law Resources. She focuses her practice on commercial cases, including disputes involving intellectual property, business and technology and other commercial contracts. She can be reached at hsamaras@ablr.biz.

Judy Weintraub is the founder of Weintraub Legal Services and ACCORD LLC, and co-founder of Advanced Business Law Resources. She has more than 25 years' experience negotiating complex commercial transactions and has handled more than 50

mediations and arbitrations. She can be reached at jweintraub@ablr.biz.