Flexible, Yet focused: Managing Surprise in Mediation
By Jan Frankel Schau

On April 15, 2013, two Chechen brothers dropped a couple of pressure cooker bombs near the finish line of the Boston Marathon. They killed three runners and injured 264 that day. The story unfolded live on the CNN feed in the lobby of our conference center that day as I was mediating a dispute arising out of a failure to provide adequate meal and rest breaks to a restaurant worker who had sued for back wages and penalties.

We have all encountered the element of surprise that may distract the lawyers, mediators or their clients from the task at hand during mediation. The response to those extraneous factors may mean the difference between impasse and resolution.

The Lawyer-Whisperer

Consider the sexual harassment case in which one of the plaintiff's two lawyers is in her early stage of pregnancy. She arrives at the mediation and asks that their be no joint session, as she is just beginning to "show," and also because her doctor has advised her to keep her feet up and eat a steady stream of saltine crackers as needed for early pregnancy nausea.

Although she expects to return to work after a very brief maternity leave, her due date happens to coincide with the court-imposed trial date and she does not want to reveal that the trial may need to be continued if they are unable to settle the case. For purposes of "keeping the pressure on," she asks the mediator to keep her pregnancy strictly confidential and avoid meeting with opposing counsel or their clients throughout the day.

Without revealing the secret of the lawyer, the mediator will have the dilemma of holding back a critical factor in the calculus of whether and when to settle and risk compromising her neutrality by maintaining a secret that may affect the outcome of the mediation or litigation if the mediation fails.

In order to accommodate the need for secrecy, one option is to keep the parties separate and wherever possible, continue all negotiation via telephone or in separate meetings. In that way, there would be no hint of the pregnancy and defendants would not be in a position to take advantage of the likelihood that the trial would not go forward as planned.

As it turned out, the negotiation in that case went on for several months. The original mediation was held pre-litigation, a second session took place shortly after the case was filed and insurance was attained, and the negotiation continued beyond that session as well. The case settled just before the plaintiff's counsel gave birth. I expect that all of the lawyers were relieved not to have to go to trial against a very pregnant lawyer, and that this demonstration of a willingness to go forward with the trial date assisted both sides in getting to a reasonable settlement in order to avoid that predicament.

Changes in Circumstance

In another wrongful termination matter, the plaintiff's lawyer had decided to leave private practice and go in house for one of her clients as soon as the case was resolved. When it did not resolve during the first session, she confided in the mediator that she wanted to keep the dialogue open as she intended to close her private law practice within 30 days. She feared that if the case were not settled, her clients would be required to find a new lawyer who may not be ready to discuss a meaningful resolution for several months and perhaps thousands of dollars of time and costs until they fully understood all of the nuances in this complicated age discrimination matter and gained the trust and respect of the plaintiff.

As it turned out, during the course of that negotiation, the defendant employer had also entered into talks to be bought out by a competitor company and also confided in their mediator that they felt an urgency to resolve the matter.

By staying with the conflict and continuing to check in with both counsel, the mediator demonstrated a general flexibility and eagerness to keep the discussions alive, which neither side wanted to reveal to the other directly. This provided adequate "cover" that each party submitted to a follow up mediation by telephone only, resulting in a resolution within that 30-day window.

It was only at the conclusion of that two-hour telephonic conference that the plaintiff's attorney also revealed that she would need to fax over her signed documents from the business center in her Hawaii Hotel, as she had a planned two-week vacation planned for the following day.

The Challenging Client

Less frequently, but occasionally, a client is unpredictable and irrational in his expectations in mediation. Prior to the mediation, the lawyer may have discussed the full complement of possible outcomes, the general process of mediation, and the flow of offers and demands as the day progresses. Yet the client may react poorly and shut down when that first unreasonable offer is made, cutting off the possibility of compromise as the day progresses. They may be investors in the stock market on a day when the DOW average plunges, or they may have childcare issues, which cloud their judgment and cause them to shut down prematurely.

In these instances, it is beneficial to have the mediator "endorse" the attorney's analysis by reiterating both the likely process and the possible spectrum of outcomes. This should be done with sensitivity, patience and honesty. It should be aimed at buoying up the attorney, who has already expressed his opinion of the likely outcome, but may not have successfully convinced his client to get on board. In most instances, the attorney will welcome the direct discussion with the errant or obstinate client in order to better manager his expectations and resume productive bargaining wherever possible.

Although this extra boost in endorsing an attorney's view of the case to his client may assist in the client "coming round" to see the wisdom of accepting (or paying) the most reasonable offer possible, it can have the opposite effect and cause a rift between the lawyer and his client. The delicate balance of demonstrated flexibility to accommodate for the obstinate client without creating a schism that can no longer be managed is truly key in these instances and demands a high level of flexibility and diplomacy on the part of the mediator.

In the end, mediation always summons our flexibility, diplomacy and focus. Without any of the three, even the most skillful mediator will lose the ability to achieve resolution for the parties in the face of the surprise extraneous factors that may arise.

As Abba Eban, Israeli diplomat, former deputy prime minister of Israel and ambassador the United Nations, famously said: "A statesman who keeps his ear permanently glued to the ground will have neither elegance of posture nor flexibility of movement."

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