

Navigating The Mediation Process: Overcoming Invisible Barriers to Resolution

Mediation involves many key relationships beyond that of plaintiff and defendant that could present barriers to resolution. The author identifies some of these relationships, shows how they can create barriers to a successful mediation, and offers suggestions for overcoming these barriers.

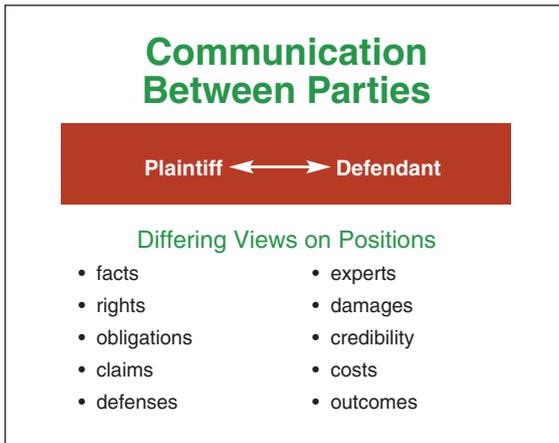
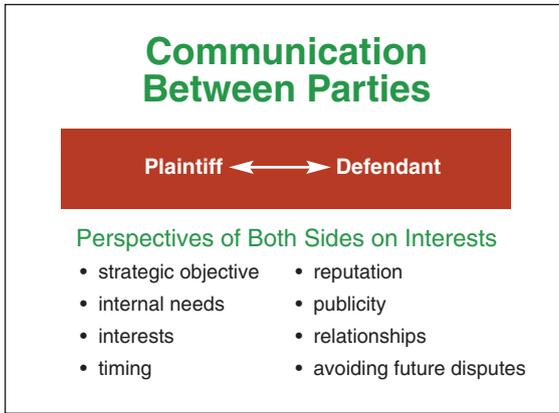
BY BENNETT G. PICKER

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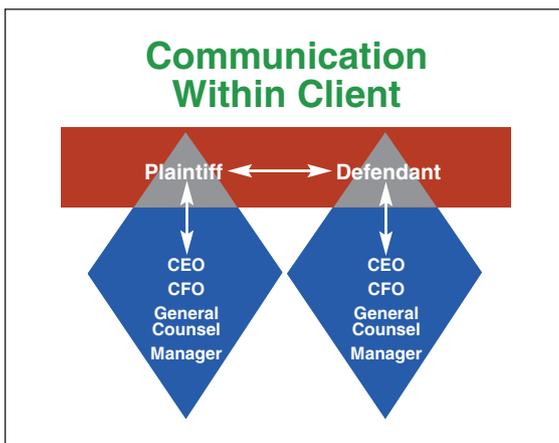
He is also a member of the Executive Committee of the American Arbitration Association's Board of Directors. Mr. Picker is the author of the "Mediation Practice Guide: A Handbook for Resolving Business Disputes" (2nd edition) published in 2003 by the ABA Section on Dispute Resolution. Mr. Picker's e-mail address is bpicker@stradley.com.

Author's Note: In order to protect the confidentiality of participants, the anecdotes in this article represent a composite of actual mediations.

Most mediation advocates and party representatives, when preparing for mediation, primarily focus on one relationship that significantly impacts resolution—the relationship between plaintiff and defendant. Given their background as trial lawyers, most advocates largely concentrate on the positions of plaintiff and defendant when considering facts, rights, obligations, claims, defenses, experts, damages, credibility issues and probable outcomes. More sophisticated advocates also explore another dimension of the relationship between plaintiff and defendant—their underlying needs and interests, including strategic objectives, timing, reputation, the potential for restructured relationships and the need to avoid future disputes.



The process of mediation, however, involves many more key relationships, beyond the primary one of plaintiff and defendant, which are often invisible to the mediation participants and their advocates and frequently present barriers to resolution. These relationships include those between: (1) representatives of each party, (2) the client and its outside counsel, and (3) the participants and other “stakeholders” in the dispute. This article highlights these invisible barriers and suggests approaches for advocates and mediators to better navigate the mediation process and



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maximize the potential for successful outcomes.

Relationships Between Representatives of One Party

A trial lawyer often pauses in the middle of a negotiation, settlement conference, or mediation, and wonders, “Why hasn’t the other side made a realistic offer? Don’t they understand their risk?” The question ignores the fact that “they”—those on the other side—frequently do not function as a cohesive unit with the capacity to either make a collective decision or speak with one voice.

For example, in a recent mediation involving an alleged breach of a long-term supply agreement, the corporate plaintiff’s representatives each entered the process with considerably different perspectives on the “ideal outcome” for the company. As the mediator facilitating this dispute, I spent well over an hour in a private caucus session with these representatives, including the company’s CEO, CFO, general counsel and general manager. After thoroughly exploring the positions and interests of the parties, we began discussing the plaintiff’s response to a proposal made by the defendant. Initially, the plaintiff’s representatives stood in total disagreement with each other.

The CEO argued that the defendant should pay a large sum of money, readily admitting that the result would directly affect the size of the bonus he would receive at the end of the year. The CFO expressed concern about the timing of any payment, conscious of maximizing reported earnings in the current year. The general counsel of the company warned that everyone in the room represented the “client”—the company—and had a duty as fiduciaries to maximize shareholder value. Accordingly, he argued that since Wall Street values long-term streams of revenue more highly than a one-time payment of cash, the agreement should reflect different pricing terms to allow for an anticipated stream of revenue. The general manager who originally determined that the defendant breached the contract simply wanted a court to affirm the breach had occurred and that she had made the correct decision.

During the caucus, I conducted what was, in essence, an internal mediation with the plaintiff’s representatives to get all of them on the same page. When I finally returned to the defendant’s room, the other side greeted me with the question, “What took them so long? Don’t they understand the strength of our positions?” Without revealing why the representatives of the plaintiff had been stuck, I delivered the good news of a reasonable counteroffer to the defen-

dant’s proposal. The negotiation moved forward because crucial communication had been privately stimulated in one room—among and between the representatives of the plaintiff. Even though the CEO had the ultimate decision-making power in this dispute, internal differences of opinion presented a serious potential barrier to resolution—a barrier invisible to the defendant.

Competing in-house concerns common to all large companies frequently hinder a corporate party’s ability to come to a mediation session with a cohesive strategy for success. For example, in a mediation involving an alleged breach of an asset purchase agreement, a heretofore invisible barrier to resolution surfaced during a private caucus when the representatives of two company

the status of litigation or the risks and costs involved in continuing the litigation leaves clients ill-prepared to make timely decisions on settlement. Making a conscious effort to communicate with and solicit thoughts from clients throughout the life of the dispute will help mediation advocates better prepare for mediation and more effectively represent clients.

A major source of the communication breakdown between an attorney and client often begins with counsel’s delivery of bad news to the client, generally concerning the risk of complete or partial loss at trial. In many instances, the client will respond by saying, “I thought you were my lawyer. If you don’t believe in my case, I’ll find myself another lawyer,” or something

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divisions began to argue about whose budget would “take the hit” for any settlement.

Similarly, a mediation involving a product liability claim got bogged down on the defendant’s side when representatives tried to internally resolve whether the payment would come out of the budget of the operating division or the budget of the office of legal counsel. To obtain the best possible result, the parties’ advocates should flag and address these internal issues with their clients before sitting down at the mediation table.

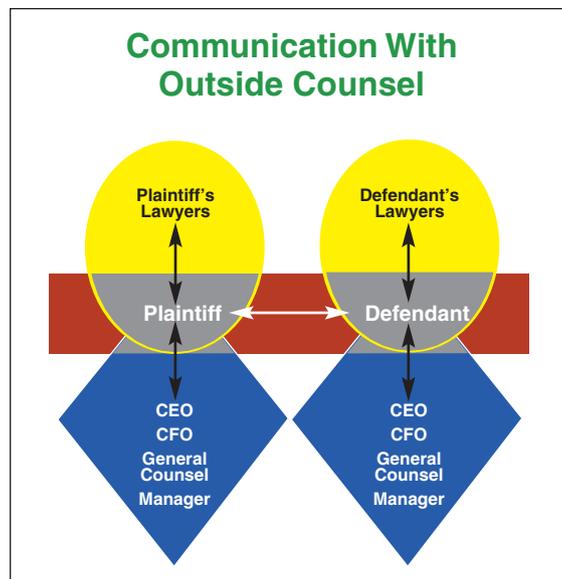
Relationships Between Client Representatives and Outside Counsel

Professor Gerry Williams, one the nation’s leading scholars in the field of negotiations, studied the settlement activity of more than 20 lawyers over a period of several years. Professor Williams concluded that the principal reason disputes failed to settle most often stemmed from a disconnect in the relationship between the outside lawyer and the client, rather than from differences between the parties in litigation.

Based on my own experience as a mediator, I agree that the attorney-client relationship merits careful examination in every mediation. A model relationship between a mediating party and its counsel will foster ongoing open communication flowing in both directions concerning the management of the case. Conflicts in this relationship often arise from unrealistic promises made by counsel about the chance of success at trial. Failing to deliver periodic communications about

along these lines. At this point, counsel may simply back off and leave the client with unrealistic expectations, rather than taking the hard road and reframing communications more effectively to keep the client well informed. In a recent mediation, trial counsel privately confided to me at the end of a dispute, “Thank you for telling my client what I could not say. I really appreciated your help.”

While it may be difficult to be candid with the client about the weaknesses of its case, I believe that mediation advocates should face that task. By helping clients understand the weaknesses as well as the strengths, advocates will leave less up to



chance and ultimately better serve the client's needs.

In a number of cases in recent years, I have found that attorney-client fee agreements create a misalignment of incentives, which, in turn, create a barrier to settlement. For example, counsel in a complex intellectual property case I mediated stated in a private caucus that a proposed settlement, which his client viewed as favorable, was unacceptable to him because his contingent fee would be too small. His standard practice, which he discussed with his client at the time of signing the written fee agreement, included refusing any settlement that did not give him a triple return on his invested time. He and I resolved this problem after a very difficult private conversation about professional responsibility.

In another recent mediation involving a shareholder dispute, the plaintiff refused a very good settlement, stating that his goals were vindication and punishment of the other side for its arrogant and unlawful behavior. Usually escalating attorneys' fees deter "billable" clients from pursuing their "principles" in protracted litigation. However, when as in this case, the attorney agreed to a contingent fee, the client was not faced with the issue of cost when making its decision with regard to settlement. We ultimately resolved this dispute, too, by helping the client refocus on whether

going to trial or settling through mediation would better serve his ultimate goals and objectives.

Relationships Between Participants in Mediation and Other Stakeholders

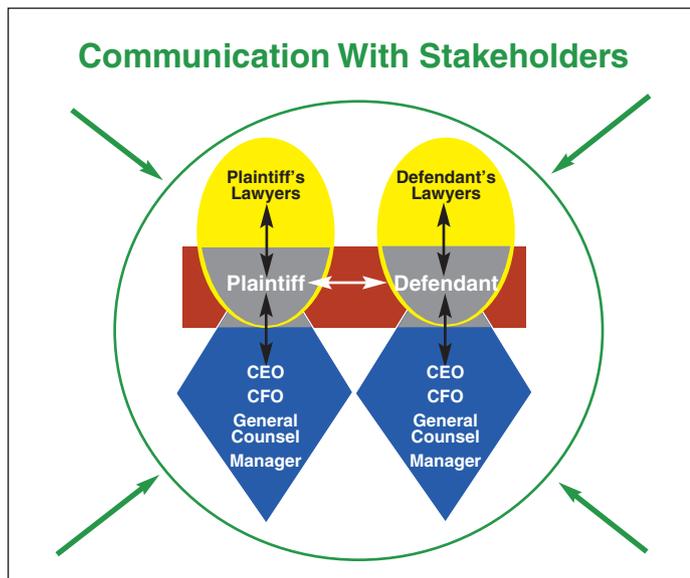
Many individuals and entities outside the formal circle of the dispute often wield influence over the decision makers participating in mediation. One obvious example is an insurance company that provided coverage to the defendant in the dispute being mediated. The insurance contract usually gives the insurer control over the resolution of the dispute, so its participation is important, but it may not wish to participate. A skilled mediator will explore the issue of a carrier's participation well before entering mediation.

Insurers are not the only non-parties with an interest in the dispute. Other people outside of the mediation room may be "stakeholders" in that they play an important role in the decision maker's own life, and therefore have an interest in the outcome of the mediation.

These people include a spouse, relative, partner, or friend, especially one who happens to be a lawyer, accountant, or other type of business advisor with a professional grasp of the dispute. A decision maker may feel pressure from or be persuaded by any of these persons, causing another invisible barrier to resolution. In all of these situations, a skilled mediator will probe during caucus sessions to identify persons who are not present in the room who may have influence over the decision maker, and adopt strategies to overcome any possible barriers.

While there are an infinite number of potential stakeholders who could potentially influence the decision makers in a particular mediation, in my experience, the issue of "authority" creates the greatest invisible barrier to resolution. In advance of the mediation, I always discuss the need to have persons with full settlement authority at the mediation. However, parties sometimes benchmark a zone of settlement in advance of the mediation and then send representatives who have authority to

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settle only up to the top end of the zone. Once in the mediation, the party representatives often recognize that their side's evaluation of the case was skewed by selective perception or advocacy bias and that they need more authority to settle. Most of the time, party representatives will place a call to a higher-level executive in a company to obtain additional authority; but the problem is that this person has not been participating in the mediation process, and thus will not have the "buy-in" necessary to make an informed decision.

Experienced mediators face the challenge of identifying as many invisible relationships and authority issues as possible in advance of the mediation, encouraging the parties to have a person with the greatest authority possible in the mediation room, and resolving issues that invariably occur regardless of any preventative efforts. In many situations, I have either called higher-level executives during the course of the mediation to involve them in the process, or postponed a mediation to include these persons.

In some disputes, a party representative in the mediation may have the necessary authority, but harbors concern about a higher-level executive criticizing his or her decision to settle above a figure previously identified in a company meet-

ing. One company executive candidly remarked that he would rather blame a judge or jury for making a bad decision than shouldering criticism from the executive officers of his company for "conceding too much."

Conclusion

To maximize the opportunity for a successful mediation, both advocates and all party representatives should endeavor to identify all of the potential invisible barriers to settlement well in advance of the first mediation session. The advocates, in particular, should pay extra attention to the relationships among and between the representatives of the client because there are likely to be private agendas and politics at work. Moreover, counsel to the parties and the party representatives should make every effort to identify the real client or clients; it is helpful to ask who in the company really "owns" the dispute. Then, they can assemble a team to define goals, discuss "authority," and try to align the varying interests and perspectives of the key players.

Invisible barriers are difficult for party representatives to recognize and overcome without assistance. A skilled mediator can help the parties identify and overcome these barriers. ■