Focus ALTERNATIVE DISPUTE RESOLUTION

Crossing the line on legal advice

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When I attended the Harvard mediation course many years ago, the instructors presented the class with an ethical problem and asked us for our views. Here it is, modified for a 2015 Canadian readership:

The plaintiff is suing for the breach of a supply agreement. The damages are easily $750,000. The equities favour the plaintiff, but pinning down the cause of action is a challenge. During the first caucus, plaintiff's counsel frankly admits that he has a serious uphill case on the law. The financially strapped client, who believes the odds are firmly against him, intimates that he would settle for whatever the defendant was willing to pay.

The mediator then goes into caucus with the defendant, whose counsel makes a passionate argument that the plaintiff's case has no merit. However, the defendant "might" be prepared to pay a "nuisance" amount.

"But what about *Bhasin v. Hrynew*?" the mediator asks. "Doesn't that change the landscape? The plaintiff isn't arguing it, but the judge could go there. The court's not going to like those e-mails — doesn't the other side have a decent bad faith argument?"

"They aren't arguing *Bhasin* because they don't know about it yet, and don't you say anything. They came to settle."

The Harvard instructors asked, "What should the mediator do? He believes that the plaintiff's case has some merit and may have a decent settlement value, but suspects that the plaintiff will jump at a nuisance offer if he thinks this is the best he can do. If the mediator raised the *Bhasin* case with the defendant, should he mention it to the plaintiff? Or should the mediator consider withdrawing from the mediation?"

Having had attended dozens of mediations as a lawyer up to this point in my career, I felt the answer was obvious: the mediator had no business educating plaintiff's counsel. It was the lawyer's obligation to know the relevant law, end stop. Others in the class felt that it would be fundamentally unfair for the mediator to discuss a relevant case with one side, and not mention it to the other. Some thought the mediator ought not to have brought up a case that the sides had not referred to in their briefs.

As a mediator who takes a (cautious) evaluative approach, I believe that it is sometimes appropriate to express a view on the law when helping the parties assess risk. But I don't believe the mediator's role is to plant ideas in a party's head which makes settlement *less* likely. It is not for the mediator to be saying: "You know, you could argue *this*." So I would not have disclosed *Bhasin v Hrynew* to plaintiff's counsel. But at the same time, I would alter my approach in the plaintiff's room by *not* emphasizing risk. They were already in danger of undervaluing their case, so why "pile on?" The defendant might be bluffing.

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Having said this, there are situations where a mediator might need to level the playing field on a point of law. I recently heard this example from a family law mediator. She shared an experience she once had where the wife's lawyer made an offer assuming a particular — and wrong — tax treatment. The husband's lawyer knew that if they accepted the wife's offer, she would be in for a big tax surprise and end up with significantly less in her pocket. He told the mediator not to rock the boat by getting into tax issues.

In that case, the mediator refused to continue the mediation without full disclosure of the tax implications of a settlement, effectively threatening to withdraw as the mediator. The husband's lawyer relented and the matter ultimately settled.

I agree with this approach, but why the difference between the two scenarios?

In the first example, the legal "information gap" pertained to the merits of the case itself. It is up to the lawyers to know the law, and if one side has an advantage because they know the law better, good for them. In the second example, the information gap pertained to the legal and practical effect of the settlement itself. If I was aware of a statutory provision or legal principle that would defeat the benefit a party expects to receive from a settlement, I simply would not be comfortable facilitating the settlement unless the parties were at least alerted to the issue.

Some mediators may disagree, saying: "We don't give legal advice." But more and more frequently, we are retained precisely because of our litigation experience or our expertise in a particular area of law. Advising the parties of a potential problem in a settlement is not giving legal advice; it is adding value to the mediation process.

Valerie Edwards is an Ontario mediator.

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