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A Comment on Communication And Complex Case Mediation

By Lester J. Levy

Most litigated conflict is caused by a communication deficit. To make an informed decision about whether and how to resolve conflict, parties must truly understand each other. As a general rule, parties in litigation communicate with each other in two ways.

The first means of communication is through established rules of evidence and procedure. Facts and legal arguments are communicated in discovery, motion practice and at trial. At fixed points, lawyers ask the judge or jury for a decision, which might end or narrow the case.

The second avenue of negotiation is informal. Lawyers on opposing sides exchange letters, phone calls, e-mail or may meet face-to-face.

This leaves the parties in an "either/or" predicament. Either, if they want the assistance of the judge, they must use applicable court rules and procedures that can limit the manner and content of communication. Or, they may attempt to communicate within the same relationship dynamics that caused the litigation in the first place.

Therefore, many complex cases in litigation can benefit from a settlement conversation that proceeds on a parallel track with the litigation, which increases the probability of clear and substantive communication and the time necessary to consider them.

A lawyer's professional responsibility for the negotiation process and to the other lawyers and clients goes only so far. Overriding loyalties to one's own client and personally held points of view may clash with a course of action better suited to a global resolution of the case. Not all lawyers can orchestrate settlement negotiations in complex multi-party cases. Moreover, the substantive disagreements, which separate the parties in litigation, often prevent the lawyers from agreeing on the conduct of the settlement negotiations themselves.

Mediation of complex cases can be more effective if it is allowed to develop as the litigated dispute matures and incorporates litigation, scientific, political and regulatory developments along the way.

Complex case mediation is different than the typical one-day voluntary or court-ordered mediation. A complex case mediator's role is to be the lawyer for settlement. The mediator is retained by the lawyers and the court to assist them in reaching agreement, so, in effect, his client is the settlement. The path to resolution of the case depends on the complexity of the disputed subject matter (including, inter alia, economic, technical or scientific data), the intricacies of the potential settlement (e.g., the number of parties and their relationship to one another) and whether there is a significant insurance component or political considerations (such the import of the case from a precedential, policy, health or community standpoint).

Complex case mediations provide a confidential forum where direct, substantive negotiation occurs. Parties communicate their needs and understandings. Unclear statements are clarified. Questions are answered. Assumptions are critically examined. Informational gaps are filled by experts. Proposals are conveyed and considered; counterproposals are analyzed and responded to. Discussions can occur globally, within discrete areas, among selected constituencies or between individual parties. Sessions that do not end in final, or interim, agreements are concluded with plans of action to be completed before the return session, and are monitored between meetings. All actions are carefully geared for a negotiated agreement.

A few illustrations may be useful. One speaks to the subtleties of settlement communications. The other provides a more "meat and potatoes" example of coordinating and organizing complex settlement negotiations with parties both within and outside of the principal lawsuit.

From a settlement perspective, insurance carrier participation often is critical. However, the inclusion of, and communication with insurers, including compliance with company-specific requirements to meaningfully participate in settlement negotiations, ordinarily are not addressed directly in the principal litigation. There may be satellite lawsuits between individual parties and their insurers, but these normally are stayed pending resolution of the case in chief under the Montrose line of cases and other similar state laws. (Even if not stayed, there often is no formal coordination between multiple lawsuits in multiple jurisdications.)

Thus, the involvement of insurance carrier representatives is left to individual lawyer preference, which may be insufficient to bring about a successful outcome. All too often some or all of the insurers are brought into settlement discussions too late in the process, which causes delays. A complex case mediator anticipates the carriers' needs so that they are adequately prepared to negotiate at the right time. Attention is also given to the carriers' needs to coordinate their efforts with other insurers at the same level of a party's insurance profile, as well as excess carriers and reinsurers.

In a recent case, a principal defendant had a block of primary, excess and umbrella coverage over many years, issued by multiple insurers. One primary carrier had paid millions of dollars in defense; that carrier ultimately paid an additional $9 million dollars to settle and exhaust its primary policy. The other carriers for that defendant took the position that they had no duty to defend and that their indemnity limits had not been triggered. Periodic mandatory meetings were held with those carriers to educate them on the status of the lawsuit and settlement and to avoid the informational imbalance described above. When necessary, the previously "non-participating" carriers were prepared and able to meaningfully participate in a complex settlement.

In another matter, a complex case mediation followed an unsuccessful series of face-to-face negotiations between the parties. The final meeting ended when one party left the room after receiving a written counter-offer. No discussion ensued, no explanation was given; one side just up and left. In addition to senior lawyers, the room contained high-level elected officials, clients with ultimate decision-making authority for large institutions, and other professionals with multiple advanced degrees in highly intellectual disciplines.

Despite all the mental firepower in the room, the parties simply did not understand one another. The side that had delivered the last proposal was perplexed: they were certain that the written proposal they presented had incorporated changes requested by the other and had offered concessions sufficient to cause the recipient to believe that a positive and meaningful step had been taken in the recipient's direction.

The parties were not communicating. Not enough time had been spent defining the issues. Terms — written words — carried different contextual meetings to each of them. In addition, a long history of contentious dealings between the parties on issues of significance had created an atmosphere of mutual distrust and expectations that words spoken or written did not convey the other sides' true intentions.

The possibility of a settlement was at a standstill. The parties needed a settlement manager, an honest broker, to help them sort through the conflict. The mediation began by focusing on separating the past from the present. Private meetings were held with each of the parties to explore their history of dealings, real and perceived impediments to settlement conditions precedent for a successful negotiation, key legal issues and their probabilities of success, potential settlement structures and appropriate means to get there. To build trust in, and a commitment to, the process, the participants agreed to dedicate the time and effort needed for intensive negotiations designed to reach a binding agreement.

A procedural path to settlement was created, in which the key issues, including legal substantive and procedure questions, were broken down, examined, explained and addressed by those most knowledgeable. The order of substantive issues was set to create a positive momentum in the negotiations. Attendees at smaller group meetings, including third-party experts, differed depending on the issues on the table. Through these efforts, an agreement began to take shape and was eventually reached — out of an environment that originally portended no settlement options.

When properly utilized, parallel settlement communications can break down barriers and erase damage caused by party-specific conduct. If parties in complex litigation are interested in meaningfully exploring settlement, those discussions must occur while the lawsuit proceeds in court. The alternatives are settlements that occur later in time, in a less organized fashion and after financial and other resources are spent. Settlements reached through the processes outlined here are superior because they allow for meaningful thought, analysis and adequate time for the parties to test the assumptions that underlie the proposed settlement.

Lester Levy is a member of JAMS and has been a full-time mediator and arbitrator since 1994.