THE EVALUATIVE PROCESS

What Mediation Participants Should Know

BY HOWARD D. VENZIE JR.

The author is a principal in Venzie, Phillips & Warshawer in Philadelphia. He is a member of the AAA's board of directors. He serves on the AAA's National Construction Dispute Resolution Committee and chairs its Philadelphia Regional Construction Advisory Committee. He also serves on the AAA's roster of neutrals and on its President's Panel of Mediators.

The subject of this article is the evaluative process in mediation and its effectiveness in (1) redirecting and neutralizing party entrenchment that comes from "positional bargaining," and (2) shifting the negotiations into the more constructive process of case evaluation. Parties and their counsel need to understand how this process, if properly handled, can shift the dynamics of the mediation process to a broader range of risk/outcome issues, which, in turn, can "open up" the negotiation process to allow more room for settlement.

Positional Bargaining

Much has been said about the shortcomings of taking hard-line, nonnegotiable positions in mediation—*i.e.*, positional bargaining—which more often leads to impasse than to settlement. Yet, positional bargaining is part of the landscape of disputes, particularly when the issues involve notions of "responsibility," "fault" and "liability" (*i.e.*, entitlement issues) and assessments of monetary value (*i.e.*, how much the case is worth).

Constructive negotiations rarely result from positional bargaining. Thus, skilled mediators look for ways to introduce a more principled and less adversarial style of bargaining into the negotiation process. The evaluative process that is at the heart of mediation opens the door to this higher plane of bargaining. Party participation in this process brings an awareness of the important matters affecting the outcome and the need to compromise.

Steps in the Evaluative Process

Mediation almost always includes a mutual exchange of premediation submissions, presentations by the parties of their respective positions in a joint session with all mediation participants, subsequent joint-session discussions, and private caucuses with the mediator. The evaluative process begins when the parties make their initial presentations to each other and to the mediator. This is often the first time that the senior management for each party hears a different side of the dispute. In construction cases, for example, senior level management not involved with the project during construction often learn than some of their own people bear some responsibility for events (*e.g.*, delays) relevant to the claim or dispute. The impact of hearing the adversary's version of the facts directly through convincing transaction witnesses, rather than having it interpreted by counsel, can also be significant.

During the joint-session presentation, senior management has the opportunity to evaluate the quality of its own case and determine whether the company's transaction "witnesses" make a good presentation and appear credible. The information learned during this process often calls into question the credibility of a "party-line" version of events, creating doubt about the value to be placed on the claim or dispute at issue.

The evaluative process continues throughout the mediation, during which the strengths and weaknesses of each side are tested by the parties' attorneys in joint meetings, and by the mediator in private caucuses. During these sessions, the mediator usually delves behind the facade of the dispute to help the parties analyze the main issue(s) driving the dispute and shape their perceptions on entitlement and case value. For example, in many disputes the mediator will find during these sessions that several areas of "material" or "interrelated" performance responsibilities exist. An example is the responsibility of a health-services provider to operate a responsive enrollment and claim-service organization so that sales agents and marketing groups are not hampered in their efforts to "book" product. Another example is the responsibility of a project owner and its design team to process information and make decisions about submissions or approvals in a prompt manner to avoid unreasonable delay or disruption to the flow of the contractor's work.

Through the evaluative process, parties tend to become more realistic about their bargaining positions and their settlement expectations because they have come to have doubts about the likely outcome of the dispute if a settlement is not reached. This helps create an environment for the development of more realistic expectations about the value of the case and more realistic settlement goals. During this process the parties may focus on:

- alternative outcomes on key issues of entitlement and monetary value;
- the impact that continuing the dispute will have on important business relationships;
- the potential value of ending both the drain on resources and the business disruption that the dispute has caused. This includes a realistic estimate of the total savings, direct and indirect, resulting from settling the dispute, rather than taking it to arbitration or litigation; and
- the peace of mind that follows from settlement and the elimination of

the uncertainty that accompanies a failure to achieve a settlement.

Parties caught up in an escalating dispute often are so consumed with the rightness of their position or with winning the battle that they often lose sight of less complicated, more direct solutions that are a significant improvement over more costly adversarial proceedings. For example, in their anger they may not recognize the advantages of continuing the business relationship with the opposing party to obtain future business or referrals of other business. They also may not be concerned at that time about how continuing the dispute will affect their reputation in the marketplace. They also may not adequately consider the importance of resolving performance or workmanship problems to satisfy the interests of a third party with a financial interest in their project, such as a surety or lender. A skilled mediator would help the parties evaluate these secondary economic interests and fashion a final settlement package based on a blending of economic and interest-based issues.

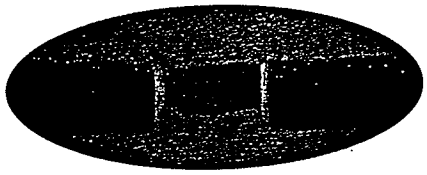
Reducing Positional Conflict on Entitlement Issues

Entitlement issues tend to dominate the dialogue in the early stages of mediation. Parties often say, "It's not our responsibility. It's their fault. We have no liability. All the liability is theirs." For the mediation to produce a settlement the parties must compromise these hardened positions. Clearly, if they have agreed to mediate, they have already decided that a third-party neutral is needed to help them reevaluate their positions on all-important issues so that the process of reaching agreement may begin.

What can inspire a party to change the dynamics of the negotiations and shift the issues away from entrenched positions on entitlement issues? The parties can explore together, for the purpose of reaching consensus on one or more concepts, industry notions of fairness, and external references points that can help achieve some understanding of basic negotiation principles. This can create a positive attitude because the negotiations are beginning to move forward, and establish a safe ground from which to push further.

For example, in a contract dispute, the parties could evaluate the risks to each side created by the contract documents. Are there areas of ambiguity in the documents that would help or hurt a party's case? Are there potentially applicable exculpatory provisions or clauses limiting liability (*e.g.*, a "no damage-for-delay" clause in an owner-contractor construction agreement)? Are there issues concerning the failure to comply with the contract, such as late notice, waiver, or the failure to perform? Has a party failed to take into account contract provisions that are detrimental to its case? Evaluating these risks in the mediation may lead the parties to understand that their entitlement to the demands being asserted may not be so clear and in fact may shift to become a "risk exposure."

Another productive area the parties could explore is the documentary evidence on which they are relying to



establish their entitlement and value claims or their defenses to these claims. Do the records support the assertions of when and how the claim arose? For example, has one party claimed timely notice, but the evidence contradicts that claim? Or are there gaps in the record that create doubt about a party's claim? Incomplete business records, poor recollections about the sequence of events, and little or no contemporaneous documentation may weaken a party's claim that it was not at fault.

The parties should also consider whether their key "witnesses," including former employees, would be available to testify at an arbitration or trial and assess the credibility and the strength of the expected testimony under cross-examination. Credibility issues invariably introduce doubt—*i.e.*, what if the arbitrator believes the other side? Those familiar with adversarial processes and the taking of witness testimony understand that witness performance before the trier-of-fact is a major uncertainty.

The mediator could also explore with the parties the concepts of joint responsibility and mutual fault, concepts that may encourage compromise on issues of entitlement. Many kinds of contracts, including construction contracts, involve mutual responsibilities by the contracting parties. Such provisions provide a basis for discussing the notion of mutual failure to perform, and the relative effect of each failure. This may enable the parties to begin to compromise their demands in recognition of their respective share of responsibility for the adverse consequences to the project or business arrangement, and shift the negotiations toward agreement and ultimate settlement.

Another factor that may help facilitate a softening of hardened positions is the identification of unforeseen events, unexpected changed conditions, or other factors outside the direct control of the parties that may have affected performance of obligations under their agreement. Accepting the notion that damages may have been due to such an event or condition may make it easier for a party to accept the concept that some compensation is due to the other side. By shifting the discussions of fact to external causes, there is no "loss of face" because this change in position does constitute "giving in" or require any acknowledgment of fault by the party who has been denying any fault all along.

Altering Expectations Regarding Monetary Value

Typically, parties to mediation have unrealistic expectations about the monetary value of their case. Often, these expectations fail to take into account the party's risk of loss on key issues or the degree of harm suffered by the claiming party. To achieve a settlement, the parties must alter their expectation to a level that is more likely to be satisfied through compromise. How can the evaluation process help move the parties in this direction?

In every mediation, the party claiming damages should prepare a detailed damage calculation. This calculation and its underlying logic and methodology are legitimate subjects of close evaluation during mediation. Both the accuracy and credibility of the damage calculation should be questioned. For example, the financial per-

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6. See *Arcadian Phosphates, Inc. v. Arcadian Corp.*, 884 F.2d 69 (2d Cir. 1989); *Channel Home Centers v. Grossman*, 795 F.2d 291 (3rd Cir. 1986). See Burton & Andersen at 349-350.

7. Burton & Andersen at 352.

8. *E.g. Borg-Warner Corp. v. Anchor Coupling Co.*, 756 N.E.2d 513 (1958).

9. Farnsworth at 227. Professor Farnsworth prefers the term "fair dealing" to "good faith" because the latter term is used in the Uniform Commercial Code to denote "the sort of honesty that makes one a good faith purchaser," which is mostly inapplicable to the present context. *Id.* at 377.

10. *Id.* at 231.

11. See *Ohio Calculating Corp. v. CPT Corp.*, 846 F.2d 497 (8th Cir. 1988), and *Ridgeway Coal Co. v. FMC Corp.*, 616 F. Supp. 404 (S.D.W. Va. 1985), cited in Farnsworth at 372, n. 11.

12. Burton & Andersen at 360. The authors note, however, that "[t]he better view is that a general duty to negotiate, without more, is too indefinite to be enforced."

13. See *VS&A Communications Partners v. Palmer Broadcasting Ltd.*, 1992 WL 339377 at *9 (Nov. 16, 1992); *A/S Apothekernes Laboratorium v. I.M.C. Group, Inc.*, 873 F.2d 155 (7th Cir. 1989), and other cases cited in Burton & Anderson at 350, 351. ns. 8 & 11.

14. Farnsworth at 380. Compare the UNIDROIT Principles of International Commercial Contracts, Art. 2.15 (Negotiations in bad faith):

> (1) A party is free to negotiate and is not liable for failure to reach an agreement.
>
> (2) However, a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party.
>
> (3) It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party.

Professor Farnsworth says European courts have been more willing than American courts to endorse scholarly theories supporting a general precontractual obligation of good faith. Farnsworth at 359.

15. *A/S Apothekernes Laboratorium, supra*, n. 13, cited in Farnsworth at 382, n. 28.

16. *Id.* at 384.

17. See *Teachers Ins. & Annuity Ass'n v. Ormesa Georthermal*, 791 F. Supp. 401 (S.D.N.Y. 1991), and *Ashland Management Inc. v. Janien*, 624 N.E.2d 1007 (N.Y. 1993), cited in Farnsworth at 384, n. 37.

18. *Venture Assocs. Corp. v. Zena Data Sys. Corp.*, 987 F.2d 429, 433 (7th Cir. 1993). See also Burton & Andersen at 379-380 (parties may have limited their discretion to the range of "objective reasonableness").

19. Farnsworth at 386-388 (citing cases under the National Labor Relations Act.

20. *American Seating Co. v. NLRB*, 424 F.2d 106 (2d Cir. 1970), and *Teachers Ins. & Annuity Ass'n v. Tribune Co.*, 670 F. Supp. 491 (S.D.N.Y. 1987), cited in Farnsworth at 389-390, ns. 63 & 65. Burton & Andersen at 372, discussing *Arcadian Phosphates*, n. 6, *supra*.

21. See *Chevy Chase v. Consolidated Foods Corp.*, 744 F.2d 566 (7th Cir. 1984), discussed in Farnsworth at 393. Compare UNIDROIT Principles, Art. 215(3) (liability for breaking off negotiations in bad faith), *supra*, n. 14.

22. Farnsworth at 393.

23. This is not the case for violations of judicial mandatory mediation rules. These rules usually provide for sanctions in the case of violations by the parties or their attorneys. For example, see *Rand Express v. Hammack, Inc.*, 1999 WL68335 (N.C. Ct. App., Feb. 16, 1999) (court allowed confidential evidence from a court-ordered mediation conference, including mediator testimony, to be admitted in a proceeding before the judge who was determining whether the parties had agreed to settle their dispute). State statutes also address this subject. See generally, D. Sharp. "The Many Faces of Mediation Confidentiality," 53 *Dispute Resol. J.* 56 (Nov. 1998).

24. *Ashanti Goldfields Co. Ltd. v. Mindev & Associes S.A.*, (R.K. 38/99, Feb. 5, 1999).

25. *E.g.*, Farnsworth at 372-376.

26. Farnsworth at 372-373. See UNIDROIT Principles, Art. 2.15, Comment 2.

27. Accord, UNIDROIT Principles, Art. 2.15, Comment 2 (party "may generally not recover the profit that would have resulted"). But see Farnsworth at 374 and n. 19 (noting that some courts have indicated a willingness to consider awarding expectation damages).

28. Courts in Australia and England also have addressed these issues. *E.g.*, *Coal Cliff Collieries Pty. Ltd. v. Sijehama Pty. Ltd.*, [1991] 24 NSWLR 1; *Walford v. Miles*, [1992] 2 AC 128.

29. See generally, Troy E. Elder, "The Case Against Arbitral Awards of Specific Performance in Transnational Commercial Disputes," 13 *Arb. Int'l* 1, 32 (1997) (meaningful enforcement of an award of specific performance would effectively require conscripting foreign courts to supervise the implementation of an arbitrator's decree).

30. Some of the cases in which there has been identifiable unfair dealing during the negotiation process have involved administrative procedures and special circumstances, not general commercial transactions. For example, some decisions involve U.S. labor law. Farnsworth at 378-80. This body of law imposes statutory bargaining obligations on employers and unions who are in continuing, long-term relationships with one another. This relationship provides a context against which to judge various negotiating tactics. Cases involving statutes that require good faith bargaining and empower decision makers expert in the subject to fill in terms when the parties are unable to do so also differ considerably from the customary contractual setting in which commercial parties ordinarily negotiate. *E.g.*, the U.S. Telecommunications Act of 1996, which obligates certain telephone companies to "negotiate in good faith" with other industry participants "the particular terms and conditions of agreements to fulfill the duties described" in the statute, including "rates, terms and conditions that are just, reasonable and nondiscriminatory." 47 U.S.C. 251(c). See *AT&T Corp. v. Iowa Utilities Board*, 119 S. Ct. 721 (U.S. 1999). ▲

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formance of the claiming party can be measured at times when its operations were not affected by adverse conditions related to the dispute, and then compared with the financial performance during the "impact" from the damage-causing events. Other types of evaluations can be made to test the reasonableness of the methodology employed to determine the damages claimed.

While damages claims may appear on the surface to be logical or reasonable, there are inherent imperfections in most calculations of damages that can be identified with the aid of the mediator. For example, some estimates of damages presented in the mediation submissions may be based on speculative or unproven assumptions pertaining to sales projections or labor productivity, cost of production or profit margins.

In addition, the claiming party may have failed to consider how its own negligence or failure to perform, which should have produced a discounted figure, affected its damages. Bringing this to the party's attention can lead to a re-evaluation of the party's position on monetary value. There may also be offsetting gains or mitigating factors, which, if recognized by the claiming party, would reduce the amount of damages claimed.

Through recognition of the weaknesses of their assessments of monetary value, the parties open the door to compromise. It is their own reevaluation during mediation that allows alternatives to enter into their thinking. Then they can start considering alternatives that lead to settlement. ■