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## PERSPECTIVE

## Transactional mediation: facilitating negotiations without litigation

By Greg David Derin

Earlier this year, American Airlines and the union representing its flight attendants jointly requested assistance from federal mediators in contract negotiations. Such aid is common and highly successful in resolving impasses in collective bargaining situations. With such long-standing exemplars, why are mediators not engaged more often to assist parties in transactional negotiations? Seeming impasses arise in a range of non-litigated or pre-litigated disputes, from stumbling blocks in single contract negotiations to multi-employer or trade group negotiations such as the current stalemate between the Writers' Guild of America (WGA) and the Alliance of Motion Picture and Television Producers (AMPTP).

DAs regular mediation participants know, the power of a process lies in overcoming false perceptions and myths. A common fallacy is that the participants are actually at an "impasse." Another is that all stakeholders must walk away from a negotiation feeling a level of disappointment to perceive that they have achieved a "fair" resolution. Experienced mediators reject these superficial views and resist approaching the process with a zero sum or 'I lose if you win' mentality. Success often lies in focusing the parties on 'expanding the pie' to achieve mutual gains.

Empowering parties to think creatively is frequently a challenge. It requires trust in one's bargaining partner and the mediator. When negotiations stall, it can

be due to a reluctance to explore one's own interests and motivations or insufficient confidence or knowledge as to how best to share information with an adversary. Allowing an impartial mediator to explore each parties' boundaries and probe their interests and the potential parameters of a bargain permits inquiry into achievable solutions, without fear of premature disclosure of valuable information.

How does a mediator bring value in this context? For best results, three predicates are helpful: (1) confidentiality in the exchange of information and in the negotiations; (2) transparency; and (3) identification of stakeholders so that all constituents commit to the confidentiality of the process. These elements assure that the parties are committed to a serious, candid process designed for one purpose – exploring all options for an optimal resolution. If one or more parties have constituencies which they must serve by publicly sharing information, there is no reason for their bargaining partner to trust them with competitive data and business plans. Resolution may be achieved, but it may not be optimal or achieve the greatest "win-win" for all concerned.

Let's explore several examples. First, a simple two-party contract negotiation: Acme is the region's largest manufacturer of titanium widgets. Willgrow is a national defense contractor which has historically purchased its widgets from Acme's main competitor. Willgrow has approached Acme about shifting its purchases exclusively to Acme and begun negotiation of price and quantities. Acme has no idea why Willgrow is moving away

from its competitor, what price it has paid in the past, and what the future may hold. Willgrow is a publicly traded company; while certain information is available, it is not enough to inform all of Acme's negotiating strategy and tactics. A mediator is employed to assist in the negotiation.

In conversations with the parties, the mediator learns that Willgrow is deep in conversation with the government to manufacture and sell a recently designed aircraft which will require titanium widgets. Although individual units are less expensive from its historic source, Acme's competitor does not have the capability to manufacture a sufficient quantity of widgets in the time required to meet Willgrow's delivery schedule for the new aircraft and meet its future needs if the project is successful. Willgrow is willing to commit to purchasing a large number of widgets over an extended period, hoping that the government will be happy with the aircraft and purchase many in the future. By locking up Acme as its source, Willgrow would position itself to supply the aircraft faster and likely cheaper than any competitor. Willgrow hopes that making a sizable long-term commitment will result in a lower price and favorable terms.

Acme has been experimenting with a new fabrication process. It believes that it can produce the required widgets, meeting all necessary strength and durability specifications, at 65% of its former manufacturing costs. Acme is suspicious of Willgrow's reasons for changing suppliers and hopes to secure a long-term commitment

with minimum orders of both its widgets and other products which it believes Willgrow utilizes on a range of projects. Such a commitment will aid Acme by providing the capital for the equipment needed to ramp up its new widget manufacturing procedure. Securing this contract will also position Acme in the marketplace to compete for contracts with other major buyers of its products.

A good mediator will probe and explore where s/he suspects that undisclosed information is driving a reluctance to move further, and will seek disclosures for mutual gain. In helping the parties frame their proposals, a mediator can transform a stalled conversation such as that between Acme and Willgrow into one in which they mutually gain from an expanded business relationship. For example, what may begin as a supply chain discussion could lead to an acquisition, just as a lease dispute

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may end in a conversation regarding a property sale. When the respective interests of the parties become clear, cash flow, time value of money, shared opportunities, all become ripe for discussion when they otherwise might have remained obscured one-sided speculation.

Next, how can mediators help in complex multi-party negotiations such as the WGA-AMPTP talks? Mediation is designed to seek mutual gain in a confidential setting in which candor encourages disclosure of useful information. If one, or both sides desire, or feel compelled, to utilize negotiating tactics such as public disclosure, the likelihood that information will be shared openly diminishes trust and the opportunity to explore options for optimal gain. It is under-

standable, for example, that the WGA might feel compelled to report to its members to meet transparency obligations or achieve leverage by public discussion of negotiating points.

Conversely, consider the alternative if information can flow freely. A major issue in dispute arises from the parties' differing perspectives regarding the economics of streaming. Those economics are complicated, with many stakeholders having potentially conflicting interests. The constituents on the AMPTP side have different interests and perspectives with respect to production, streaming and their interaction with each other and with legacy theatrical and broadcasting outlets. If truly candid conversations might occur, and purely distributive (i.e., zero sum) bar-

gaining was replaced by transparent discussion, one might imagine the development of transformative business models and proposals embracing the future evolution of streaming. This would require the sharing of data concerning production entities, streaming services, studios, networks, unions, related businesses tied to streaming services, and the list goes on. Such negotiations could reform perspectives, and the partnership of creative and business elements, utilizing the power of mediation at its best.

Even a transparent and candid conversation cannot ignore economic and social realities. The parties might share data to consider new economic models to address mutual interest, but still find that their objectives differ. One side

might seek "economic justice" while the other seeks "economic efficiency." The parties could still recognize these differences and the potential for their accommodation. To bargain as if this was merely an exercise of power by one or both sides is fine; it will continue to achieve short-term solutions as it always has and as technology and institutional structures evolve. But nothing great was ever achieved without imagination and sacrifice.

Without underestimating the colliding forces of shareholder obligations, entrenched institutions, creatives paying their daily bills, and the entire industry supply chain, it is also a reality that historically there is no more creative and enterprising group than those staring at one another across these tables. Mediators are here to help.