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PERSPECTIVE

Finding your way to the exit in the labyrinth of mediation

By Greg Derin

Seeking a means to trap the deadly Minotaur, King Minos of Crete commissioned the architect and craftsman Daedalus to create a structure capable of holding the creature. Daedalus designed and built what we have come to know as a labyrinth – in its original form, a complex maze with a unitary entrance and exit. The Minotaur survived, defeating all who challenged it until Theseus killed the creature, aided by a simple ball of thread which he used to mark his path so that he would not lose his way stalking his prey.

Over the centuries, labyrinths have taken many forms, moving from deadly traps to ornamental garden mazes, single paths to intricate branching patterns. They adorn famous landmarks and palaces, private properties, public institutions, gardens, religious grounds, and recreational spaces. Designers and artists have used them as cultural, spiritual and religious symbols, sometimes imbued with magical powers. Inherently, a labyrinth symbolizes complexity, mystery and challenge.

As a mediator of commercial and intellectual property disputes, I am accustomed to multiple participants providing lengthy, heavily footnoted briefs, accompanied by numerous exhibits, deposition transcripts and videos. You have seen this picture, which looks like a motion for summary judgment without the constraints of an applicable evidence code. Resembling a labyrinth, at the outset it is unclear whether there is a unitary entrance and exit or branching routes with more than one opportunity for exit.



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Every labyrinth presents multiple opportunities and challenges for determining the motivations and interests of the parties, the strengths and weakness of their positions, and creative options for resolution. Viewing even the most complex litigation as a labyrinth brings a central mediation problem into relief. While there are many options for creative solutions, the parties must be willing to collaborate to locate the path to an exit.

The task is always stated simply: find the path and the exit. However, when I initially ask participants their goal, the first response is always to ‘end the dispute.’ Probing further, a simple solution such as an amount of money, acquisition of rights, or

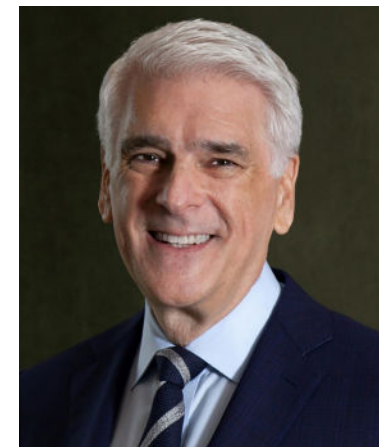
hockey tickets is proffered. The more we discuss, the more the path emerges and obstructions clear. But always, the task is focused on the path. No one gets to hop over the hedge or run past the Minotaur.

How do wise advocates locate the path?

Prepare. Theseus arrived at the labyrinth with a ball of thread enabling him to hunt his adversary while marking his return path from entrance to exit. The best mediation advocates have prepared by taking at least these three steps.

(1) Reevaluate. Wherever they find themselves in the life of the dispute, they reevaluate. Whether

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the matter is pre-litigation or on the steps of the courthouse, it may no longer be as it appeared when the client first called. Facts develop, they may not be as originally perceived or communicated by the client, insurance has emerged or diminished, witnesses have disappeared, disappointed or performed well, damage analyses have become fraught. How does the client's position appear now, on the day of the mediation?

(2) Speak with the mediator in advance. It is essential to understand how the mediation process will proceed, and to communicate your perspective on the most effective approach. If the mediator is too busy to speak with you in advance, or unwilling to do so, find another mediator who is willing to be completely invested in resolving your dispute. Let the mediator know of problematic issues and facts that may arise or personality issues that need to be managed. These conversations may also involve substantive questions or matters of procedure (e.g., who should attend) which facilitate an effective process.

(3) Involve the clients and prepare them for the negotiation. Clients should participate in the preparation of their mediation statement to assure the accuracy of the facts and positions taken. This also avoids surprises if the client is learning of legal or factual problems on the day of the mediation. They should see the opposing parties' mediation briefs if available. A mediation is a process and the client needs to understand what to expect. What is the style of the mediator? Will the parties see and communicate with one another? Who will make the first proposal? Strategically what message should that proposal communicate?

Negotiate With Integrity. Mediators are accustomed to astronomic opening demands followed by minuscule responsive offers and the drama which follows. That theater is unnecessary if the parties know where they are prepared to resolve the case and trust the mediator. No one will settle for less or pay more than they reasonably believe to be appropriate. In the best of all worlds, parties should begin a neg-

otiation in the range that reflects this reality. Skeptical parties nevertheless test each other before moving into a reasonable settlement mode but trust your mediator to get you there before bedtime. As long as your bargaining partner is negotiating in good faith reward them and everyone will reach an amicable resolution before sunrise.

Do not take a wrong turn. Do not get lost in the labyrinth, you will never find your way out. After hours of productive negotiation, do not raise a new material term just as daylight is in sight. If an issue is material, raise it while there is still room to negotiate, not when one move remains.

Do not let weeds overgrow the exit. There is a momentum to a negotiating process. Some parties push the process so that matters do not resolve on the day of mediation. A labyrinth is constructed of living organisms, like hedges. As such, weeds can grow if care is not taken. The weeds can strangle and kill the hedge, and certainly obscure the exit if allowed to grow

out of control. Follow the momentum, take advantage of progress, and do not allow others who have not participated in the hard work of constructing a resolution dump cement in the path of the exit. If you reach a deal, sign at least a memorandum of understanding if not a long form settlement agreement.

Do not fly higher than your wings allow. The facts, law and circumstances of the parties allow only so much latitude for any of the parties in a negotiation. Some results, if insisted upon, can only be accomplished after the cost and risks of trial, and often not even then. Those who overestimate their leverage often forget the lessons of the labyrinth. Daedalus, who had constructed the original labyrinth, also created wings which he and his son Icarus used in an attempt to escape their imprisonment in the labyrinth. In an act of hubris or inattention, Icarus flew too close to the sun and the wax holding the wings together melted leaving Icarus to plummet to his death in the sea.