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PERSPECTIVE

When a mediator must be the bearer of bad news

By Lori Dobrin

Much has been written about the value mediators bring to the litigation landscape. As neutrals, they can help parties overcome seemingly insurmountable obstacles to arrive at a mutually satisfactory resolution of their dispute. Mediators provide a safe space for contending parties to share their stories, they listen carefully to both sides, and they offer guidance and support as the parties negotiate their way toward final settlement of their matters.

Little has been written about another role that mediators often must play. Mediators may help to break down barriers and build bridges as they guide opposing players to the finish line and help them across it, but sometimes they must be the heavies, bearers of bad news that the parties really don't want to hear.

It's not necessarily a role they relish, but it's often a necessary role for mediators. Unless parties and their counsel are given a dose of reality during the mediation process, they may end up making decisions or taking actions that could jeopardize or completely destroy their cases.

Imagine, for example, an accident victim who envisions a multimillion-dollar recovery from the truck driver who hit her one night as she walked along a roadside. Her attorney is



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committed to getting the highest possible recovery, but he may have heard only her side of the story. He may be unaware of her history of erratic and unpredictable behavior. He may not know that she was wearing dark clothes and walking into the traffic lane on an unlit section of highway when the accident occurred.

The mediator, in contrast, has heard both sides of the story. He knows about the limits on the driver's insurance policy, and he has a strong sense that a jury will likely be more sympathetic to the

driver. It's far from a slam dunk for the plaintiff; it could very well be decided in favor of the driver. The plaintiff needs to understand the risks she faces if her case won't settle in mediation. She needs to be told the bad news: This isn't a multimillion-dollar case.

Or consider a landlord suing his tenant for unlawful detainer. The tenant refused to vacate a house that the landlord planned to sell, and the landlord wants to get every penny he can out of that recalcitrant tenant. He expects to recover a huge amount for the loss of op-

portunity he suffered: The market was at a high point and alterations had been made to the house. The tenant, on the other hand, believes that he was mistreated and should be paid something for the injustice of being uprooted and having to relocate.

But the mediator has reviewed documents and read the law, and she sees a picture that is not the way either party envisions it. She must deliver the bad news to both sides: The owner failed to file proper notice as required under the law, and any lost opportunity he is

claiming would be speculative at best. The tenant, who opted to stay in the house after he was instructed to leave, is still obligated to pay rent for the time of the holdover. If they don't settle the matter in mediation, neither will likely get what they want in court.

Think about what might happen if a plaintiff were to hold out for a large award without understanding a defendant's precarious financial position. Insurance policy limits might ultimately determine the amount of a potential recovery when a defendant has limited means. What if the defendant's conduct is not covered under his insurance policy? A plaintiff who isn't brought up to speed on the economic realities and who fails to settle against such a defendant could risk going to trial and winning a substantial verdict that is worth less than the piece of paper filled out by the jury.

Without disclosing confidential information, the mediator can thus throw cold water on unrealistic expectations. A good mediator will listen empathetically to both sides, hear their pain and frustration, and then deliver the bad news. It is never the mediator's job to judge a case and deliver a verdict. No mediator should tell a party "You're going to lose this case."

Instead, the bad news can be delicately delivered in a sympathetic and helpful way. "I'm concerned that your position might not be accepted in the way you're expecting." "There's a chance a jury may view your position differently." "These are factors that could play against you if you take this to court." "This is why you may want to consider accepting the amount that was offered by the other side."

Usually, the mediator will deliver the bad news to counsel, and counsel will communicate it to the client.

The mediator can thus be the "bad guy" so that counsel retains standing in the client's eyes. But sometimes, the message must be delivered directly to a party. This might happen if counsel is uncooperative or if the mediator is asked to be the bad news bearer. If the mediator has up to that point successfully gained the party's trust and respect, that party is more apt to accept the mediator's unpleasant message and seriously rethink his or her previously held position.

When mediators are called upon to be the bearers of bad news, parties should be better able to understand and appreciate their actual risk profile, including any risk that they might ultimately receive nothing. They should be more open to listening to the other side and considering other possible outcomes. And they should be better prepared to view any final settlement as a successful outcome.

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