

dbbr

DAILY BUSINESS REVIEW

BOARD OF CONTRIBUTORS

Real-Life Encounters: The Elephant Not in the Room

by Ellen Leesfield and Pam Perry

Mediations can be as unique as the cases that spawned them.

But one pattern often emerges: After months of focusing predominantly on their position, parties enter the mediation room and get a long look at the other side's case — the law as their opponent reads it, the facts as they interpret them and their adversary's view of the probable outcome in court.

The mediation becomes a brief but intense learning process — a daylong immersion that takes time, patience and presence, both physically and intellectually. Settlement postures evolve as case assessments shift, priorities change and the parties come face to face with the costs of fighting on.

As a result, a mediation can be derailed when a party breaches the process by calling a friend or spouse — a person who has been miles away from the mediation session in every sense of the term.

Mediators rarely witness the call to the off-site interloper, but we have all experienced the aftermath. About halfway through the day, the party phones his friend or family member and announces that his thinking has changed, and he may settle for less than he had said he would insist upon when they discussed it just the night before.

The outsider responds by exhorting the party to “be strong” and not compromise — advice perhaps borne of love and loyalty, but devoid of the crucial information and insight the party has developed throughout the mediation day. Feeling emboldened — or chastised — the party hangs up, re-enters the mediation room and announces that he has changed his mind and will accept nothing less than his initial demand — often without explaining why.

These calls are particularly frustrating for the mediator because we are unable to speak with, reason with or even identify the person who has suddenly become a key player in the settlement process. Simply put, after hours of making apparent progress, the mediator discovers that one of the most significant influences in the mediation is the elephant NOT in the room.

Preventing Intrusions

We can trumpet the importance of mediation confidentiality all we want. But this is life, not law school, and short of confiscating cell phones, there is little a mediator can do to prevent these mid-mediation disruptions. On the other hand, there is certainly something that counsel can do to prevent these off-site intrusions long before the mediation begins.

Specifically, if counsel observes that his client regularly consults with a friend or family member before making case-related decisions, he should suggest that he or she be invited to attend the mediation if opposing counsel agrees. Typically an adversary will not object if he understands that it will assist the settlement process. Likewise, the mediator will be happy to have all of the people who matter most to the parties under one roof.

Bringing the elephant into the tent can work wonders because it converts an arguably uninformed interloper into an educated invited guest who can assist — rather than undermine — the settlement process. So keep your eye out for the elephants in your client's life, and if you see one, consider seeking permission for him or her to attend the mediation session.



By the way, it bears noting that actual elephants are among the world's most intelligent species and have superior cognition, memory, humor, patience and self-awareness — traits welcome at any mediation. That said, you may want to limit your mediation invitations to two-legged elephants because the four-legged version will require a very strong chair and a whole lot of Evian. Elephants often weigh in at over 5 tons and consume well over 50 gallons of water a day.

Of course, if an actual elephant ever saunters into your mediation room, you may want to refrain from lowballing the big guy; when angered, elephants are known to spread their ears, trumpet and charge — an event even worse than the midday call to the two-legged elephant who should have been at the mediation all along.

Ellen Leesfield of Ellen Leesfield ADR was a Miami-Dade circuit judge for nearly 20 years and regularly serves as a mediator, arbitrator and special master. Pam Perry of Dresnick, Rodriguez and Perry has been a certified civil circuit mediator for over 10 years. They are married and have two rescue dogs but would be happy to adopt an elephant someday.