HOSPITAL WORKS
MEDIATION

Teaching Note

Hospital Works is a mediation simulation with roles for a mediator as well as parties and counsel in a two-party dispute between P.D. Terrell and the Good Neighbor Hospital.

It is not an easy case to mediate. The facts for each participant include some built-in animus. Neither party or lawyer knows the other's perspective, interests, or full circumstances. I have used it in lawyers' mediation training workshops, as a final exercise – after introducing mediation basics with simpler simulations. One could theoretically use this with student mediators, but I suggest waiting until later in the course.

As a practical matter, this case takes a minimum of three or four hours to mediate. You could easily use it as the basis for a full workshop day, by breaking it into stages: perhaps preliminary conferences with counsel, private preliminary meetings with both sides (as in the real case), and then the mediation sessions. There's plenty in it to keep co-mediators busy.

The basic story is that the plaintiff, P.D. Terrell, was hired a year earlier by the Good Neighbor Hospital's former CEO and board. The former CEO had promoted the establishment of a luxury wing of the hospital for maternity, cosmetic, and other elective surgery, which caused some resentment in the lower-income neighborhood adjacent to the hospital, who claimed that the luxury wing increased traffic congestion and late-night ambulance noise. The plaintiff was brought in to address the abysmal state of community relations this caused. The board terminated the former CEO approximately 6 months later and brought on a new CEO, Brian Watson, who fired the plaintiff a few weeks later.

Though the main claim made by P.D. Terrell is age discrimination (P.D. is 50 years old), the case facts also suggest possible claims of discrimination on the basis of religion and sexual orientation. The plaintiff made a demand of $2 million, based on his $100,000 salary and benefits, back pay, front pay, emotional distress, etc. The defense has not countered, except to suggest mediation.

ZOPA and Creative Options for Integrative Terms

A purely monetary settlement doesn't appear to be possible at the outset: the plaintiff's lawyer doesn't recommend settling for less than $500,000 and the defense lawyer doesn't recommend paying more than $75,000 (calculating $200,000 as maximum exposure. At least at the beginning, the defense client is holding onto the idea of paying only. The CEO defense client instructions talk about "de minimis" or nuisance value settlement because they don't see any exposure. The good news is that the instructions say they are "always open to persuasion." The plaintiff's instructions describe his interests and concerns. On the topic of settlement, the plaintiff knows his lawyer's basis for the formal $2 million demand in the

complaint but "it seemed conservative" to him. In preparation for the mediation, the plaintiff's lawyer suggested he "give some real thought to what you would want to settle the case" but did advise him it would take 2 years until trial. The lawyer added: "I won't get in the way of a settlement that works for you, but I won't push you to settle short."

Nevertheless, a purely monetary settlement is theoretically possible IF both sides listen to each other, to their lawyers, and potentially to a neutral evaluation of what might happen at trial. The instructions don't require the role-players to be inflexible or to hold to a position. Still, when you set up the mediation, it's a good idea to remind them that, while the instructions describe what their current thinking is, they can surely allow their thinking and analysis to "evolve." I might say: "If the mediator or a party or lawyer on the other side says or does something that would be persuasive or shift your thinking, you can move in that direction. But don't do so just to finish a classroom or workshop exercise."

It's much easier (and arguably better for both sides) if the mediator learns the parties' interests well enough to reveal or help formulate creative options better for both sides than straight cash. For example:

- P.D. has a clear interest in a positive reputation in the Cincinnati professional community if he wishes to find another position there. The Good Neighbor Hospital could facilitate that with a recommendation highlighting his strengths (ignoring the rest).
- While the role information says P.D. doesn't want to move – he accepted the job in Cincinnati to take care of his mother there – it would frankly make sense for him to look for a position back in Memphis and move there with his mother. The defendant hospital corporation could facilitate that by promising to pay moving expenses.
- P.D. purchased two condominiums in Cincinnati, one for himself and one for his mother (who already lived there). And he assists in paying his mother's expenses. That means he is cash-strapped. What if the hospital were to purchase one or both of these condominiums? The hospital acquires assets – it isn't just paying settlement cash.

If P.D. does decide to move back to Memphis (with or without a job in hand), the condominium purchase might make sense, or a term that allows P.D. to put them on the market, with Good Neighbor guaranteeing purchase a certain price.

- There are no doubt other options: Free health care for mom? For P.D.? (Not necessarily possible in the real world, but fine in a mediation workshop realm.)
- While the CEO doesn't want to bring P.D. back, and P.D. frankly wouldn't want to work there, one could imagine some type of fixed term/fixed assignment consulting gig or payment for P.D. to summarize what he learned, whom he had contact with, where potential donors or enemies might be found, etc. While some lawyers view this as "non-real world", I have mediated cases that include terms such as this. They are face savers for the plaintiff. On the defense side, while a cynical CEO might argue that P.D.'s information isn't worth much, it has to be worth something. Settlement dollars paid just for settlement yield nothing. Dollars paid for P.D.'s report, or work with select groups (whatever they cook up) will yield some value.

Characterization, Meaning and Reframing the Numbers.

The case also provides several opportunities to demonstrate how skilled mediators can re-characterize the parties' choices so that the meaning of settlement is more palatable. That's what the mediator did effectively in the real case upon which this was based.

One mediator strategy is to build on the decision-maker's attitudes toward each other. Never mind trying to change or soften them; forget shifting perspectives. In caucus, think and talk through the consequences of the decision-makers' views of each other. Here's how that might work on both sides:

1) When in caucus or a preliminary meeting with the CEO, the mediator might ask if he's pleased with P.D.'s replacement he hired. How is she doing? How much better off is the hospital now…. Keep this going. The mediator may even ask the CEO to estimate her financial value to the hospital. The CEO will no doubt be eager to tout his great hiring decision, Then ask, well, what if you hadn't replaced P.D. so quickly, where do you think the hospital would be now? How much worse would the financial picture be? If the CEO is playing to character, the answer is 'much worse."

With this prelude, the mediator can suggest that the CEO made a tough but necessary business decision, extremely valuable for the hospital, and any settlement is a necessary cost of that decision. The mediator can lean in on the timing: Does anyone really think P.D. would have gotten any better in the next six months? If the CEO had waited, P.D.'s claim would be much weaker. The strong decisive CEO knew that moving quickly was the only way to save the hospital.

The other obvious way to frame settlement is as part of cleaning up the mess left by the predecessor CEO.

2) In caucus with P.D., the mediator can also build on his distrust animus toward the CEO. A strong aspect of their case is that P.D. and a few other older executives were terminated within three weeks, while younger folks were given six months to impress the new CEO (or not). The mediator might ask if P.D. (and his lawyer) think Brian Watson was ever going to treat him fairly. "Let's say that someone – a lawyer - advised Watson to give everyone the same six months, and he listened. Given the way he related to you, at the end of six months, do you really think he would have kept you on? Knowing what you know about his attitudes, do you really think there's anything you could have done?" From P.D.'s perspective, the answer has to be no.

If that's true, the mediator can note that the CEO's decision to terminate P.D. in three weeks, essentially caused a loss of only five or so months of salary, not more. Surely, the CEO would have cut him off at 6 months with the others. That's a loss of just under $50,000. And if the CEO had waited, P.D. would have had a much, much weaker legal claim because younger

people were terminated at the six-month mark too. So, in a strange way, the CEO's unfairness to P.D. was a strategic blunder. It gave rise to a much more valuable legal claim. When this mediator used this approach in the real case, the plaintiff's lawyer was startled: "Wait, you're not saying we should be limited to six months - $50,000 as a settlement?" My answer, of course, was "Oh no, of course not." You will negotiate for as much as possible. I am merely suggesting that it's a way for P.D. to think about this. P.D.'s actual loss from the CEO's decision to terminate him at three weeks was about five months of pay because we know he wasn't going to give P.D. a fair shake and would have done it then.

In case a course or workshop doesn't include enough time to play out the full Hospital Works mediation, this package of materials includes stand-alone vignettes that can be used to focus solely on characterization and framing.

Perspective Shifting and Empathy

This case also offers mediators the opportunity to demonstrate or learn how to encourage parties to consider the other's perspective. In joint sessions and/or in caucus, there's value in enabling the CEO to see that P.D.'s fate was cast by the prior CEO's flawed plan. Even if the plan was not impossible, P.D.'s background and skill set were not a good match. His predecessor should have known that. P.D. uprooted, moved from a community he knew well, and was put into a tough situation that wasn't a good fit.

P.D. should be able to empathize (maybe) with the CEO's position, whether he likes the CEO personally is not the point. The CEO faced a crisis and a need to turn it around, and FAST: to stop the bleeding. He was under tremendous pressure and had to make snap judgments.

On a really good day, a mediator might be able to suggest the CEO acknowledge that P.D. might have made progress and might have worked out within 6 months. It's possible. The CEO had to make snap judgments he hoped would benefit the hospital. He was doing the best he could. (It's not easy to get an employer to acknowledge his judgment could have been hasty - it's possible that he misjudged the employee. Legally, even though it makes the lawyer nervous, there's no admission of liability as long as he wasn't discriminating and was trying to do his best. It doesn't mean he has to take the plaintiff back. But it sure makes the plaintiff feel better.

Note about Hidden Facts

The plaintiff's side includes a fact that is entirely unknown to the defense. When the former CEO met with P.D. at a restaurant to negotiate regarding the job, he (allegedly) offered a three-year contract. There's some deliberately ambiguous suggestion that they negotiate "termination only for good cause" or that termination within the term would require the hospital to buy out the remainder of P.D.'s contract. [In real life, contracts such as this allow termination for cause limited to legal or ethical transgressions, etc., but payout through the

contract term for other reasons. None of that is made explicit here.) Of course, P.D. wrote up notes about the contract on a paper napkin in the restaurant and brought it home. He hasn't yet located this crucial napkin among the boxes in his house. Neither Good Neighbor Hospital's new CEO nor its attorney know anything about this. No one has asked the former CEO about it.

From a lawyering perspective, whether or not to raise it is an interesting question for the plaintiff's side. On the one hand, a three-year contract puts a hard limit on damages; no more than $250,000 or so for the contract buyout. However, if PD can't find that napkin and if the napkin doesn't clearly contain specific terms and constitute a contract, there's a rather large statute of frauds problem. But, if the contract terms are clearly reflected on the napkin (did the former CEO initial it?), no one has to wander through the thickets of employment discrimination.

If the plaintiff does decide to share the information about the three-year agreement and the missing napkin contract, this too provides an opportunity for the mediator to influence the way the plaintiff feels about a lower-than-welcome offer from the defense. The mediator might point out that, though the defense doesn't know it, P.D.'s arrangement with the former CEO was a three-year term. If it had ended at three years, there would have been no recourse. The CEO didn't last long. But at most, PD would have had certainty for three years –or $250,000 left on the contract. How much less than that is the defense offer on the table? In other words, talking about the missing napkin three-year term may lower the plaintiff's psychological "bracket" for settlement.