

My COBAR

The Colorado Lawyer

The Colorado Lawyer
June 2005
Vol. 34, No. 6
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Specialty Law Columns **Alternative Dispute Resolution Column**

Using Joint "Technical Teams" to Simplify Settlement Negotiations And Mediation
by Joseph McMahon

This column is sponsored by the CBA Alternative Dispute Resolution Committee. The articles printed here describe recent developments in the evolving field of ADR, with a particular focus on issues affecting Colorado attorneys and ADR providers.

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This article addresses the use of collaborative "technical teams," made up of in-house or outside experts representing all parties to a conflict. The members of these technical teams work together to cooperatively produce joint evaluations that assist senior negotiators in finding settlement, either in mediation or direct negotiations.

Technical teams, comprised of individuals with expertise or skilled technical representatives from each party in a conflict, sometimes are used to assist the resolution of conflicts in mediations or settlement negotiations. The technical team process has been productively used in business, environmental, natural resources, and accounting disputes. Although data regarding the use of technical teams are somewhat anecdotal, there is reason to support their expanded application and improvement of the process.

The use of technical teams addresses two key areas. First, it responds to the settlement negotiator's need for expert aid on complex issues. Second, it addresses frequent complaints that expert advocacy results in loss of scientific objectivity. Technical teams can productively focus on the details, while saving the energy of senior negotiators for business negotiations leading to a final settlement. Ultimately, this process seeks to use science as a resource, rather than as a policy battleground.

This article addresses how joint technical teams may be used to simplify complex issues, both in mediation and direct settlement negotiations. In this article, teams that are made up of an expert representative from each side of the conflict are referred to

as technical teams or simply as teams.¹

Reasons to Use a Technical Team

A technical team can help with a number of important goals in the resolution process. These include: (1) lessening the effects of complexity as a barrier to resolution; (2) focusing the energy of technical members toward settlement; and (3) letting senior negotiators avoid unnecessary factual conflict. (See the accompanying sidebar, "Participants in the Technical Team," for a description of those participating.)

Lessening Effects of Complexity

Many factors delay or inhibit resolution, including the factual and relational complexity of the conflict. Complexity makes decision-making hard² and settlements more difficult to achieve. Factual complexity also may cause settlement decision-makers to delay hard decisions, therefore unnecessarily delaying resolution. In this process, technical team members engage in separate factual or scientific discussions to provide the senior negotiators with a joint report to aid them in moving to settlement.

Focusing Technical Teams Toward Settlement

Technical teams can help do the following: (1) better address the issue of complexity; (2) avoid scientific or technical "advocacy"; and (3) improve the chances of success in settlement or mediation. To be effective, the parties' technical expertise must be focused on solutions, rather than on expert "competition." Although expert witnesses are highly trained problem-solvers, the litigation culture can turn experts into advocates.

The goal of the technical team process is to move the team members back to a problem-solving mode. Therefore, the technical team should have several important objectives. First, the team should focus its energy on removing complexity. Second, the team should make science or technology usable for (understandable to) senior negotiators, rather than making them a hindrance. Finally, where possible, the technical team should create models that help decision-makers. For example, these may include pictures, diagrams, maps, matrices, spreadsheets, and economic models.

Unnecessary Factual Conflict

When a technical team has performed well, the senior negotiators (who may lack the specific expertise or time to deal in the detail) are presented with reports from the team that provide clarity. With this clarity, decision-making at the senior level is more easily undertaken. The technical team process also can simplify discussions or even later adjudication if the case is not fully resolved in settlement. The thoughtful assessment of science allows the parties to focus energy on the real conflict and avoid unnecessary collateral disputes.

Technical Team Process Goals

When using the technical team process, three factors need to be addressed. First, it is essential to create the proper work environment for the team. Second, the team is given the task of providing useful data to the negotiators. Third, participation in the team should not compromise any participant's later testimony or discovery.

Participants in the Technical Team
<p>Facilitator or Mediator: Neutral party engaged to assist settlement.</p> <p>Legal Counsel: Each party's in-house or outside legal counsel.</p>

Senior Negotiators: Senior business representatives who represent each party and who will make the final decisions (or recommendations to the board of directors) regarding settlement.

Technical Team: In-house or outside experts who participate in technical team discussions and activities.

Create Environment For Teamwork

The technical team process needs an environment that, at least temporarily, moves experts and consultants away from the adjudicative and scientifically competitive environment. The process seeks to harness the experts' abilities and desires to problem-solve and simplify data. Legal counsel working on the settlement negotiations can help create this working environment, as can senior negotiators and the mediator or facilitator who may be assisting.

Useful Data for Negotiators

When the right environment is created for the team process, the technical team is expected to collect, sort, and analyze data so it can be useful for the senior negotiators. In this process, "useful" data means objectively viewed data, rather than data summarized from a partisan perspective. The technical team must be prepared to assemble and summarize data without trying to skew the outcome of senior level negotiations. All outcome negotiations are the purview of senior negotiators.

Noninterference with Court/Arbitration

The intent of the technical team process is to gain benefit from collaborative technical efforts without substantial interference with ongoing or planned litigation or arbitration. To do so, it seems best that all parties jointly authorize the experts to participate in the process with an agreement that the technical team effort will not affect later discovery or testimony. A written agreement should clarify that understanding. (See discussion in the section entitled "Written Agreement," *below*.)

Experts should separate their work as litigation experts from their work as members of the technical team. For example, they should completely separate documents and files in the matter.

Establishing the Technical Team

The following topics may aid counsel and the opposing party in setting up the technical team. Nonetheless, this discussion is only for guidance; each case is unique and will need tailored solutions. (For an overview of the process, see the accompanying sidebar, "Steps in the Technical Team Process.")

The process works best (and is safest) when the parties in the conflict reduce their technical team agreement to writing. If the parties are in mediation and using a written mediation agreement, that agreement may be amended to include this process. Otherwise, counsel should draft and sign a separate agreement that describes and protects the process. (See "Written Agreement," *below*, for more about the agreement.)

Specifying Questions for Technical Team

A set of focused questions for the technical team helps ensure that its joint efforts are given direction. As such, the technical team's responses to these questions will be more useful to the senior negotiators. Although there may be exceptions, legal counsel and senior negotiators are best suited to draft the set of questions, with review and comment by the technical team.

Avoiding Forum for Discovery

A customary fear of trial lawyers is that the opposing party is merely discussing settlement to obtain discovery. Steps, such as the following, can be taken to reduce this potential problem:

- Define the general nature of the data that will be exchanged in the process.
- Establish schedules that use alternating or simultaneous disclosure by technical team participants to obtain some level of mutuality in disclosure.
- Mark and agree that the exchanges and analyses are confidential settlement information.
- Inform technical team members that the senior negotiators expect the discussions and data exchanges to be proportionate. In other words, there is an equitable sharing of information.

Removing Negotiation From Technical Team

The process goal is to simplify complex data—not to have the technical team try to directly or indirectly influence the ultimate negotiation outcome. Therefore, the technical team should focus on responding to questions and simplifying data. Practice suggests that each member of the technical team should receive a direction from his or her respective senior negotiator: "Your task is to work to simplify data and answer questions. Do not negotiate; leave that to the senior negotiators."

Whether to Facilitate Team Meetings

Whether the activities of the technical team should be facilitated by an outside neutral person may depend on whether the process is being mediated. Another factor is whether the technical team is prepared to do its work effectively without assistance. Teams often can do so without any third-party aid, although facilitation can speed the process and expedite summarization of the team's work.

Steps in the Technical Team Process
<ol style="list-style-type: none"> 1. Senior negotiators for the parties agree to use a technical team and identify the questions to be answered by the team. 2. Written agreement for use of the technical team identifies team members from each party, lists questions to be addressed, and establishes a schedule for the team's work. 3. The technical team meets (with or without a facilitator) as scheduled to gather data and respond to questions. 4. The technical team drafts and issues a joint report to senior negotiators. 5. As appropriate, the technical team presents its report to senior negotiators for all parties to the conflict and responds to their questions. 6. Using the technical team report, senior negotiators return to their negotiations.

Selecting the Right Participants

The team process requires both technical expertise and an ability to communicate and distill information in a collaborative environment. The experts must be able to work in such an environment or the results of the process may be limited. Although most highly qualified experts can do so, the practitioner should carefully consider whether the

selected expert has the desired qualities.

In many circumstances (such as with governmental regulatory agencies), an expert has already been designated for the matter. In that case, there will be no opportunity to select an expert; the designated expert must be able to so function. When there is no real choice on the identity of the team member, legal counsel and clients should coach the expert as needed.

Conferring and Reporting Out

The technical team should confer as needed to make a joint report to the senior negotiators. Although the reporting to senior negotiators could be done individually by each party's expert (see "Individual and Confidential Reports," *below*), a joint report forces a level of collaboration and requires speaking to the senior negotiators, at least on some issues, in a common voice. The process works best if the report is jointly written rather than written in individual sections by each technical team member and later tacked together.

The joint report can take several forms, such as: (1) a drafted narrative on which consensus was reached; (2) a drafted narrative on which substantial consensus was reached, with comments from differing experts; (3) majority and minority responses to each question; or (4) a "where we agree/where we disagree" format. Often, the team experts are asked to make a presentation that summarizes their work to the senior negotiators (and mediator, if applicable).

Individual and Confidential Reports

Individual experts can and should make private and confidential reports to their respective clients to complete the assessment of the data and put the joint report in context. The private and confidential report generally can help the negotiating process, as long as the technical team members are suitably candid in their team discussions and have jointly reported the key facts and considerations of their work.

Written Agreement

A written agreement that clarifies the technical team process provides more safety for the process and a common understanding of what will happen. When in mediation, the agreement can be a "Supplement to Mediation Agreement." When negotiating outside mediation, it could be an "Agreement Regarding Settlement Negotiations." In either form, the agreement for this process should generally do the following:

- Set up the technical team and identify each party's experts
- Describe in detail the questions for which answers or improved understanding is sought
- Establish any needed exchanges of data prior to technical team meetings; it is suggested the agreement contain a description of the data expected from each party to encourage mutuality in disclosure
- Determine how and when the technical team will meet (dates or deadlines)
- Confirm confidentiality of the technical team process and that it will not affect any subsequent litigation—for instance, specify that information concerning this process will not be sought in discovery or be a subject of inquiry in testimony
- Describe the report that is desired and confirm that the technical team members are to summarize and assess data (not negotiate outcomes). This may be accomplished with both interim and final reports from the technical team. If feasible, the agreement may suggest formats for technical team reports.

Written Reports

By requiring a written report from the technical team, the senior negotiators have a better opportunity to obtain more detail and collaboration from the team. The requirement of a written report, even if it is short, can focus the technical team on its

tasks.

To avoid having technical team members become advocates, the technical team members should be directed to write their report from a scientific rather than legal perspective. The report should respond to the questions presented to the technical team by the senior negotiators and, unless specifically requested, should not state what is thought to be the proper outcome of the settlement or mediation.

When the process is facilitated by a neutral third party, the facilitator can assist in making the report neutral. He or she can draft interim summaries of the work of the technical team.

Presentation to Senior Negotiators

It may be helpful to have the technical team present its work to the senior negotiators as a short presentation that highlights their agreements and disagreements, if such exist. In a simple two-party case, each expert can summarize his or her work and comment on the other expert's opinions. In more complex, multi-party efforts, the technical team members can appoint a spokesperson to present their joint report. Thereafter, each party's expert can highlight any differences or necessary interpretations. In the presentation (as well as the written report), the team would be asked to report on the technical or scientific issues and questions assigned—leaving outcome negotiations to the senior negotiators.

Examples of Technical Team Use

There are various ways to use technical teams in resolving disputes. Following are several examples of conflicts in which technical teams may be brought in. The cases listed below describe matters in which the author has facilitated the use of technical teams.

Complex Mining and Royalty: A five-party dispute involves multiple complex issues, such as mine plans, transportation, and royalties. Multiple technical teams made up of a representative of each party confer and report to senior negotiators on options for revising mining plans, methods, and payment options.

Legal Issues: A multiparty dispute deals with complex royalty and real property implications. The mediator sets up a legal technical team to summarize key issues that the parties must address in settlement to reduce conflict and permit easy implementation.

Accounting Complexity: In a business dispute, many discrete financial transactions are in conflict. Senior negotiators agree to use an accounting technical team to summarize the transactions into usable categories for subsequent negotiation.

Technical—Hydrogeology: In a dispute over geology, technical representatives of each of the four parties meet with facilitation to produce a series of data summaries and matrices. These materials help senior negotiators determine options for settlement or further investigation.

Site Remediation: In a dispute over Superfund site remediation, technical team members hold facilitated meetings to consider whether they can make a joint report with recommendations to senior negotiators. They issue a report that permits the senior negotiators to negotiate toward a settlement of ongoing litigation.

Environmental—Endangered Species: In a six-party dispute, experts from the two key parties make joint presentations to the mediation team members. The presentations address areas of agreement and disagreement concerning the habitat and risk to a threatened species, as well as the effects on various land use options.

Conclusion

The use of technical teams can yield results ranging from merely informative (low-end

performance) to very successful (at the high end). Although cause-and-effect relationships are complex in mediation, in the author's experience, proposals for settlement sometimes emerge as a direct result of using technical teams.

Some less-than-optimum results typically occur when a technical team member cannot stop being an advocate. Usually, that causes other experts to begin advocating. However, in general, the success of any individual effort in the technical team process is determined by the attitudes of the party representatives and legal counsel. Where business representatives and legal counsel are open to working within and supporting the process, the technical teams are likely to be successful.

NOTES

1. The author's first substantial encounter with the concept of using technical teams occurred in 1997 in a mediation conducted by Bob Mnookin, Harvard Law School, and Gary Friedman, Center for Mediation in Law. Since that time, the author has used and modified the approach.
2. See Clemen, *Making Hard Decisions*, (Belmont, CA: Wadsworth Publishing, 1996).

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