

Mediating Microsoft

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Mediators never kiss and tell. But within the bounds of appropriate confidentiality, lessons can be learned from the three-week mediation marathon that led to Microsoft's settlements with the Department of Justice and with at least 9 states.

Federal District Judge Colleen Kollar-Kotelly took over the case in July after the Court of Appeals partially affirmed the prior judge's findings that Microsoft had violated antitrust laws.

Neither the mediation nor the settlements would have happened if Judge Kollar-Kotelly not acted to suspend litigation and order settlement negotiations. The judge's September 28th mandate was blunt: "The Court expects that the parties will . . . engage in an all-out effort to settle these cases, meeting seven days a week and around the clock, acting reasonably to reach a fair resolution." Judge Kollar-Kotelly gave the parties two weeks to negotiate on their own, ordering them to mediation if they couldn't reach agreement by then. The court bounded its "24/7" timetable by ordering the parties to complete mediation by November 2nd.

Tight timetables command attention. In mediation, just as in negotiation, time used tends to expand to fit time available. A firm deadline, like a hanging, gets the parties to focus, even though it sometimes results in the hours before the mediation deadline resembling the last two minutes of an NBA final game.

We are both professional mediators with 40 years of combined experience. We have mediated many antitrust and computer cases. We are avid computer consumers. But we are not experts in the applicable law or the disputed technology.

Even had we had such expertise, our objective would not have been to try to craft our own settlement solution and sell its merits to the parties. We believed that the only chance of getting all or most parties to a settlement was for us to work intensively to help them create their own agreement. Our "job one" was to facilitate and assist in the gestation, birth and maturing of such an agreement. We had to be advocates for settlement – optimistic and persistent -- but not advocates for any particular settlement.

Reaching a settlement required working with adversarial parties with very different views about a large number of technologically and legally complicated issues. When we arrived on the scene, the parties had begun exchanging drafts of possible settlement terms. There were issues concerning whether certain matters should be included at all, about the scope of acts to be mandated and proscribed, and about the words that should be used to capture the complex reality that would have to be regulated in any settlement.

After initial separate briefings, we moved the process into an extended series of joint meetings, involving representatives of the Antitrust Division, the state Attorneys General and their staffs, and Microsoft. No party was left out of the negotiations. The bargaining table had three sides. Throughout most of the mediation the 19 states (through their executive committee representatives) and the federal government (through the staff of the anti-trust division) worked as a combined “plaintiffs” team. We worked to ensure the right mix of people, at the table and in the background. The critical path primarily ran through managing and focusing across-the-table discussions and drafting by subject matter experts – lawyers and computer mavens -- with knowledge of the technological and business complexities gained through working on the case since its inception. The critical path also required working with senior party-representatives who could make principled decisions about priorities and “deal breakers.”

Our objective was a global settlement. As the mediation ended last Tuesday, most parties had agreed to the proposed Final Judgment that will be reviewed by Judge Kollar-Kotelly over the next several months. But the Attorneys General of several states decided they preferred continued litigation to what they saw as an inadequate settlement.

Even as settlement advocates, we have no quarrel with the partial settlement that was achieved. Our most important measures of a successful mediation don’t turn on whether all – or any – parties settle. Successful mediations are ones in which mediators and parties work to identify and overcome barriers to reaching agreement. Successful mediations are ones in which all parties engage in reasoned discussions of issues that divide them, of options for settlement, and of the risks, opportunities and costs that each party faces if a settlement isn’t reached. Successful mediations are ones in which, settle or not, senior representatives of each party have made informed and intelligent decisions. The Microsoft mediation was successful.