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EXPERTADVICE

BY MARK LEHOCKY | JULY 25, 2016

Negotiating in Mediation: Why Did We Stop Talking?

Practical advice for engaging your adversary in dialogue to ensure the most productive mediation.

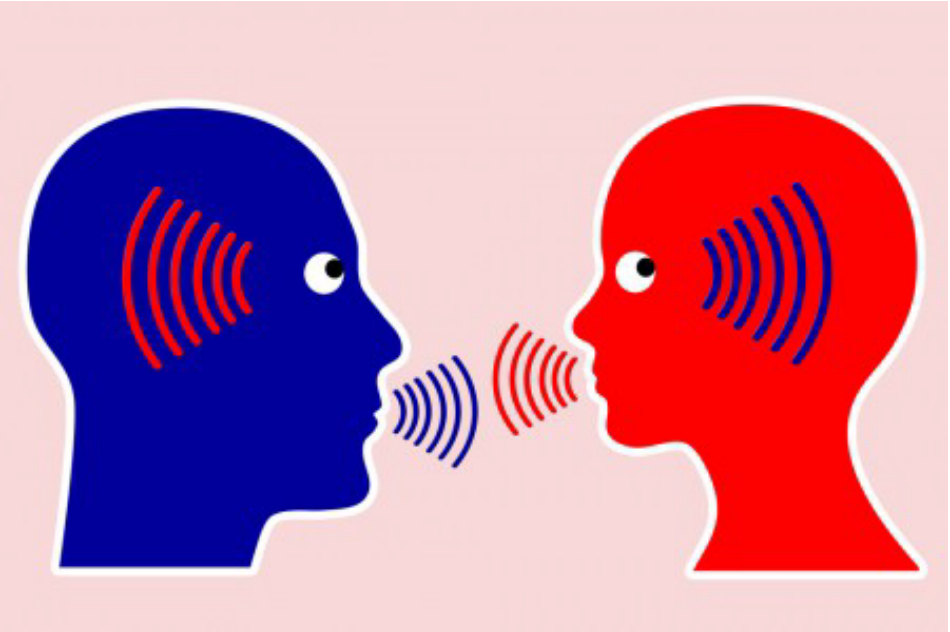
A successful mediation typically depends upon three key steps:

engaging the client on why and when to mediate;

actively engaging the adversary prior to the mediation; and

advocating at the mediation session itself.

The first installment in this series offered a path for counsel and clients to overcome their initial mediation anxiety. In this installment, let's focus on early, active and ongoing *dialogue* with the other side to ensure the most productive mediation.



GET TOGETHER AND TALK BEFORE MEDIATION

Isn't this step obvious? You might think so, but it seldom happens. After nearly two decades serving as a neutral, I continue to be struck by the number of times opposing counsel introduce themselves to each other *for the first time* at the mediation session. I'm also struck by how frequently those attorneys are still sorting out the core facts as the mediation unfolds.

Mind you, counsel have communicated before, whether by way of pleadings, email, discovery demands and responses. In addition, their respective position statements assert and deny certain facts. But more often than not, those battling lawyers haven't taken the time (or the opportunity) to speak directly – and by directly, I mean face-to-face, in person if possible -- to parse through strengths, weaknesses as well as those facts that shouldn't be in dispute (even if their legal consequence may still be debated).

Sadly, in this age of instant electronic communication, the practice of talking directly has, in many cases, deteriorated. That depressing reality can shortchange everyone in the mediation process.

WHAT'S HOLDING US BACK?

Initially, a few thoughts as to what may be going on. Keeping in mind that mediation is still an evolving area, many counsel seem to believe that substantive conversations should be deferred to the mediation, because, well… isn't that the whole purpose of mediating?

Actually, it's not. Indeed, experience teaches that the prospect for success at mediation is often tied directly to an active pre-mediation exchange between the adversaries – *what do you see differently and why? What do you think of this witness? This document? This fact? This argument?*

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Understanding those differences early on helps everyone calibrate (and re-calibrate) their respective strengths and weaknesses. It also allows parties to set appropriate expectations before they step into the formal mediation session.

Delaying a substantive exchange until the mediation session often hampers progress. Armed with most, but not all, of the key facts and a sketchy picture of the other side's strengths and weaknesses, counsel and clients often start mediating with an incomplete and unrealistic view of their likely prospects. As a result, parties tend to open with, and cling to, extreme positions. They have difficulty adjusting to, and ultimately accepting, a reasonable outcome.

Why make this any harder for your client and yourself than need be?

Here as well, another aspect of mediation anxiety kicks in, namely the suspicion that the other side won't engage on a professional level, won't reciprocate in a meaningful exchange, or worst of all, may misread your overtures as a sign of weakness (particularly if you suggested mediation in the first place). No need to fear.

TAKE THE HIGH ROAD

The suspicion that the other side is incapable of engaging in a civil dialogue about strengths and weaknesses typically stems from a prior bad experience – the failure of simple courtesies, unreasonable demands, slights and obstreperous behavior, you name it. Fact is, that stuff happens.

However, rather than allow such examples to impede progress, keep in mind the anxiety (and potential client issues) that may exist on the other side. You may be on edge – but your opposing counsel may be on edge as well, and maybe even more so. They are likely struggling, just as you are, with unduly high client expectations and myopic low opinions of their adversary's position.

With all this mind, it is even more important to take the high road. Initiate the conversation and overlook any perceived shortcomings or slights from the other side. Whether you practice the "count to 10 before you respond" rule or use humor to change the tone of a difficult conversation, trust in these truths: persistence pays off; diplomacy reduces anxiety on the other side; and frank, honest, courteous discussion will almost always prompt a more substantive exchange of views.

Remember: the more you know, the better prepared you (and your client) will be to negotiate.

THERE IS NO SCORECARD

Don't keep a tally of the amount of information exchanged. Ignore the old saw that the other side is only looking for "free discovery." Free, or at least less expensive, discovery is not a bad thing. Recognize that in many instances – for example, class and representative actions – the amount of core information is not held equally by both sides. Worry less about the mythical scorecard and focus instead on information your side may offer that could alter the other side's perceptions. In most instances, that information is discoverable, will be turned over later (at greater expense), and may indeed readjust the other side's assessment to your benefit now. All the more reason to communicate sooner rather than later.

In addition, don't rule out other forms of reciprocity that can be negotiated to help narrow the dispute. While one side may have more information than the other, the other side may be asked to more specifically identify the claims at the core of the controversy. Whether by amending pleadings or otherwise, explore a potential quid pro quo that focuses everyone on the central claims that triggered the battle. Time, money and energy will be saved all around.

AVOID MISIMPRESSIONS

Many attorneys still equate mediation with settlement and the suggestion of mediation as a form of capitulation. *You proposed mediation because you expect to lose at trial. Because you expect to lose, I can drive a hard bargain at the mediation.*

In fact, the opposite is often true, and how you explain your proposal makes all the difference.

To avoid any misimpression, it is critical to explain why you are proposing mediation as well as engaging in substantive conversations before it takes place: *Our investigation so far doesn't support your claims or defenses, so we would like to better understand what you have and share what we have found. Hopefully this direct exchange will help us both see what separates our views and then make the best decisions about our dispute. If our direct exchange doesn't do the trick, let's bring in a mediator to take a fresh look and see where that process takes us.*

Think about it. This approach conveys confidence – the antithesis of anxiety – both as to your own investigation and your belief as to how a neutral third party should evaluate the dispute. Ideally, the exchange that follows helps the other side reset their expectations prior to any mediation, and may in some instances obviate the need for a mediation at all.

This type of direct exchange of information may also clarify facts or problems your side hasn't seen before, which may in turn shift *your* view of the dispute. But isn't it always better to uncover those problems as soon as possible? How many times have we heard clients (and lawyers too) say the fateful words: *I wish I'd known that when……*

Worse case, the exchange does not bridge the gap between the parties. But even there, providing you have accurately handicapped your dispute, you will be better prepared for the mediation and your client will have the most realistic assessment of the likely litigated outcome.

PREPARATION IS EVERYTHING

Seasoned attorneys do not go to trial without thorough preparation. Why go to mediation underprepared? The more you understand upfront what the other side sees, and they in turn understand your view and the facts your position is based upon, the more likely your mediation will be productive. Pick up the phone. Better yet, meet your opposing counsel in person, perhaps over a cup of coffee. No letters. No emails. No texts. No tweets. *Talk* through the case in detail with your opponent prior to mediation.

If you do, you will learn, as I have, that thoughtful live conversation trumps all else.