

# **Representing Clients in Mediation**

*by Martin I. Reisig*

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As a full-time mediator, these are the attitudes, qualities and skills I observe in attorneys who satisfy their clients by helping them to expeditiously resolve conflicts through mediated settlements.<sup>1</sup>

## ***Partners Resolving a Problem***

The goal of mediation is to manage or resolve a problem. The goal is not to seek an admission that one side is right and therefore the other must be wrong. A more helpful attitude is that the other side is really a partner in resolving a dispute. When a ship is going down it does not matter whether you are in the bow or stern, the ship is going down and you're both in it. Protracted litigation for most is a sinking ship. The parties have a mutual problem that can only be resolved by working together. This perspective of partnering, as compared to trying to beat the other side, dramatically changes conduct.

Both clients would normally rather put the problem behind them. Both parties have better things to do with their lives than committing years to lawyers, costs, anger and uncertainty. A perspective of co-ownership in a shared problem and partnering to solve it will lead to settling most cases.

## ***Listening***

Lawyers and clients too often listen with the intent of cross-examining or disproving whatever the others are saying. This approach is inconsistent with working as co-owners of a problem. The key is to choose to listen in order to better understand the other point of view. This type of empathetic listening takes work and planning by the lawyer and client, as it is a natural defensive position to simply disagree. However, few

of us are ready to reach an agreement before we have been heard and feel understood. If the goal is to resolve the conflict, then there must be a conscious choice to listen in order to understand the other perspective and to let the other party know that they are understood.

I don't have to change your mind to be comfortable with you, but I do have to feel that you have heard and understood me. When the mediator restates what has been said it is really to let each side know that they have been heard and understood. The respect that is shown by sincere listening creates a desire to settle. The best question asked by a skilled attorney in mediation is a genuine "help me to better understand." Good lawyers listen more and posture less. I have been impressed by the listening skills of good attorneys and their prepared clients, which create the atmosphere for cases to settle.

### ***"And"***

Learning to think about multiple truths and multiple perspectives allows for constructive conversations. The simple word "and" allows good lawyers and their clients to bridge gaps and find common ground. Sometimes referred to as the "and" stance this posture of openness allows all in the room to reach for a resolution. Instead of knee-jerk contra-arguments, skilled attorneys look to include multiple views. When I hear words like "Thank you, we now better understand how you were hurt by our actions and we appreciate that you better understand how we thought this all happened," we are getting closer to a resolution.

As lawyers we too often act like our client's position is correct and hence the other side must be wrong. When we step back there are multiple viewpoints. Crisis tends to narrow perspectives; add litigation and it's so easy to be delusional in our self-righteousness. Mediation is an opportunity to broaden perspectives and to adopt the "and" stance, which simply reinforces a respect for different perspectives and the understanding that to resolve problems all views should be taken into consideration.

### ***Contribution***

We all want to look good, right, smart, fair, honest, etc. When something goes wrong our ego and self-identity make it easiest to blame the other – the other party, the

other lawyer, the judge etc. However, with most problems everyone involved shares some responsibility. This spoken or even unspoken acknowledgement opens the door to settlements.

Good lawyers help their clients through this self-examination. Mediations can bring out the best in lawyer counseling. The right questions are often “how did you contribute,” “what do you wish you had done differently,” and “what could you have done better.” It is critical to keep focused on the goal of settling a dispute – not winning an argument.

### ***Perspective***

At some point litigation takes on an ugly and seemingly independent life of its own. Mediation is an opportunity to put the conflict back into a broader and healthier context. Sometimes this happens through a willingness to honestly participate in role reversal; i.e. “how would you react/feel if you were in the other’s position....” No one has to accept the other point of view – they only have to understand it and, if possible, even respect it.

A question sometimes posed during a mediation is, “How do you really think this all appears to a neutral observer?” While hard to do, it is worthwhile to imagine that it is 30 years later and you’re telling your life story. Was this conflict worth losing the relationship/business? Was it worth years of battling? Did it bring out the best in you? The mediator plays a role in putting a third-party perspective on a conflict but it is the lawyers to whom clients must turn for wise counsel, and in the end it is the clients who must be willing to take a broader view.

### ***Prepared to Resolve***

The settlement process begins long before the mediation. In analyzing the conflict with their clients, good lawyers have to do more than simply marshal their best arguments and discuss the best possible financial outcome. This kind of limited preparation is a hindrance toward getting the case resolved. Preparation means beginning to think about the interests of the other side (your negotiating partner). What possible resolutions would make sense to them as well as you? There will not be a ruling at the

mediation. So preparing to win all arguments is a waste of time. The preparation is to begin to explore reasonable solutions with your client.

While preparation is important, it is best to come to the mediation with genuine curiosity to learn and understand the other perspective. Ideas will change and good counsel leaves plenty of room for themselves and their clients to learn and change. Coming to the mediation with blinders on defeats the purpose, but coming unprepared is equally unproductive.

While mediators provide guidance, it is often our privilege to observe satisfied clients as their lawyers model the above-outlined attitudes and skills toward resolving disputes.

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#### **Footnote**

1 See *Difficult Conversations* by Stone, Patton, and Heen, Penguin Press (1999), which explores concepts of successful conversations and provides the framework for many of my observations.