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Mediation: For Lawyers, Sharp Negotiation Skills And Emotional Insight  
Are As Important As Advocacy

by  
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When I started practicing law fourteen years ago, attorneys generally did not take their cases to mediation. Today, in contrast, about 90% of litigated cases settle, a large portion of which settle during or shortly after a mediation. Mediation has become an essential component of virtually every litigated case, but most attorneys practicing today have had little or no mediation training.

An attorney who utilizes a variety of skills in mediation is more likely to obtain successful results for his client. These skills can be divided into three categories: advocacy, negotiation, and emotional insight.

For most attorneys, our law school training and subsequent on-the-job experience have taught us all we need to know about advocacy. It is rare, however, for attorneys to have received adequate training in the areas of negotiation and the emotional context in which negotiations occur. In this article, then, I will focus on how to improve your negotiation skills and emotional insight to obtain the best results for your client in a mediation.

The Negotiation Dance: If You Sidestep It, You May Not Get The Best Results  
For Your Client

As a mediator, I often encounter lawyers and clients who would prefer to sidestep the negotiation dance. "I just want to let them know what my bottom line is and forget the negotiation," lawyers and their clients tell me.

Take my advice: Don't do it.

Lawyers need to take into account the different expectations the other side may have of the negotiation process. If the other side is not a bottom line negotiator, then your bottom line demand or offer will simply become the new ceiling or floor to which the other side will counter.

I frequently see this scenario play out in mediation. Prior to any negotiations, the lawyers have an informal conversation in which the plaintiff's lawyer says to the defense lawyer, "if you get your client to 500,000, I'll try to get my client to \$500,000." At the mediation, plaintiff's lawyer adamantly refuses to move below \$500,000, claiming that \$500,000 was his client's absolute bottom line. The defense counsel, however, believed that the \$500,000 discussed by the plaintiff's lawyer was just a counter-offer, and has created an expectation with his client that the case would settle well below \$500,000.

Unless you have personal knowledge of the negotiation styles of both the opposing lawyer and his client, you should assume that they expect to take at least three turns at making or countering offers.

Now, you may be thinking that I'm needlessly advocating gamesmanship. But consider this scenario called the Winner's Curse: The plaintiff makes an opening demand and the defendant immediately agrees to pay it. The plaintiff got exactly what he asked for, and should be ecstatic, right? Wrong! Because the defendant agreed to plaintiff's opening demand, the plaintiff feels that he left money on the table. Similarly, the defendant can experience "seller's remorse" if the plaintiff instantly accepts the defendant's first offer. This is because the back and forth exchange during the negotiation satisfies a need that each side has tested the numbers with the other and obtained the most favorable settlement.

Once you've begun the negotiation dance, a good mediator can tell whether it's going to be dramatic and protracted like a tango, clean and quick like a waltz, or choppy and jolting like the merengue. By sensing the style of the other side, a mediator can offer techniques to close the deal more quickly, such as making a mediator's proposal or asking the parties to participate in hypothetical bargaining. These techniques allow parties to consider settlement options confidentially with the mediator, without moving unless both sides agree to the proposal or the next round of demand and offer.

Okay, so you are committed to negotiate, but where do you start? Most plaintiffs want to start very high and defendants want to start very low. These decisions are, of course, your choice. However, in my experience, those who make the first credible demand or offer have control over the negotiation.

Many attorneys are reluctant to give a credible demand or offer because they fear weakening their bargaining position. But it is important to remember that you have the opportunity to convey a specific message for each round of negotiation. Therefore, you can tailor each move based on the response you receive from the other side. By viewing the negotiation as a flexible dialogue and utilizing a mediator's tools to help facilitate the negotiation, you will obtain better results for your client.

## Identifying Emotionally-Driven Incentives Can Produce Better Results For Your Client

If you think back on your most difficult cases, I'll wager money that intense emotions were driving the disputes.

For example, a client's anger may drive him to pursue the case to the extent of destroying important business, familial or personal relationships. The client may become obsessed with the case and spend substantial amounts of money litigating-- often many times more than the value of the case -- even when it's likely that he will lose.

It can be difficult for attorneys to discuss emotional issues with their clients, and when they do, some clients may misconstrue these discussions as an indication that their attorney is not capable of zealous advocacy.

But if the emotions are not addressed, they can lead to results that are far from optimal for the client.

In such circumstances, mediation is an ideal process, and as the litigating attorney, you can explain to the mediator in private that difficult emotions are driving the dispute. In so doing, you are alerting the mediator to very real, but often unspoken, issues that affect both the cost, and possibly the outcome, of litigation.

A good mediator will use your insight to help the client articulate the hidden interests that lie behind the emotion, and help defuse the emotion by addressing those hidden interests in a variety of ways. For example, a discharged employee may need to be recognized for her contribution to her employer; family members in an inheritance dispute may need to grieve the death of the deceased relative; a fiduciary -- who may have legitimately helped the plaintiff in certain respects but failed in others -- may need recognition for his contributions in order to take responsibility for his failures.

As a result of this work, your client will gain a clearer understanding of the dispute and will be able to make a more informed decision about whether or not to settle.

In litigation, there will be a winner and a loser. In mediation there is neither, and this absence of a zero-sum game enables the parties to relate to each other in a more multidimensional way than the world of litigation allows. Sometimes the emotions dealt with in mediation have no direct legal relevance, but by simply acknowledging them, the party is able to put closure on the lawsuit.

Mediation is the ideal venue for this kind of work, and as an attorney you can be an important part of the process. Your efforts will lead to greater client satisfaction with the outcome of the case and greater appreciation for your work.