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The Art of Negotiation in Mediation

How to Gain an Advantage by Negotiating Cooperatively

We lawyers pride ourselves on being competitive. We often think that the only way to represent our clients effectively is to be aggressive, unyielding and obsessed with “winning.” The notion that negotiating *cooperatively* might, at times, produce superior results seems at best like wishful thinking. But let me assure you – in the context of mediation, you can gain a real advantage by knowing when to put aside your competitive instincts and negotiate *cooperatively*.

Let me be clear. I am *not* asking you to jettison altogether your competitive instincts; indeed, they are critical to negotiating a good result in mediation. But I *do* want you to consider adding a cooperative element to your negotiation style. Why? Because there are moments during mediation when it is most effective to be competitive, and moments when it is most effective to be cooperative. And, in my experience, the very best negotiators know how to move effortlessly between these two styles.

This technique can produce dramatic results for your client.

Here’s how it works. (For the rest of the article, [click here](#))

First, think of negotiation as encompassing both process and content. *Process* is the *manner* in which you interact with the other side – your tone of voice, your empathy for their position... in short, your *attitude*. *Content*, in contrast, is the actual *substance* of the negotiation – the facts, the monetary numbers, and so forth.

Now, since a negotiation occurs on those two levels, it is possible – for example – to show cooperation to the other side through the *manner* in which you interact with them (process) while simultaneously remaining competitive about the *substance* of the negotiation (content).

We all understand how to negotiate competitively. But let’s examine how to negotiate cooperatively – both in terms of process and content – so you can begin to add these powerful techniques to your negotiating arsenal.

Cooperative Negotiation – Process

The process aspect of cooperative negotiation focuses on how you interact and communicate with the other side. In my experience, the best negotiators in mediations are adept at using the following techniques.

- 1) Listen to the other side objectively. And I mean *really* listen.
- 2) Repeat the other side's position in a neutral way. This lets them know that you have indeed been listening. Remember, to repeat the other side's position in a neutral way is *not* the same thing as agreeing with it!
- 3) Keep your voice and body language calm. When discussing your client's story, maintain a calm demeanor and use language that does not polarize the other side. This will encourage the other side to continue listening and not be defensive.

When you listen and speak in a cooperative way, you create rapport with the other side, and this can often help you when you need to negotiate more competitively later on.

Here's an example.

In a false imprisonment case, the plaintiff, a teenage girl, sued a store that accused her of shoplifting and held her against her will. From the plaintiff's perspective, she walked into the store with merchandise to return and had left the receipt in the car. She spent time perusing the store and then exited the store with the merchandise in hand. The store's loss prevention detective accused the plaintiff of theft and didn't let her get the receipt. Instead, the detective called the police and a subsequent, unsuccessful, prosecution ensued.

Instead of immediately recounting the facts favorable to the defense, the defense lawyer began her opening statement as follows:

"I grew up in this area and went to the same store when I was your age. I know what it feels like for store clerks to think that you look like a potential shoplifter when you walk into these kinds of stores, because they did the same thing to me when I was your age. So I can imagine how you felt when the loss prevention detective stopped you and assumed that you stole the merchandise."

The defense lawyer created a connection between her and the plaintiff by identifying with the plaintiff and expressing empathy to her. Once establishing the connection, it was much easier for the defense lawyer to explain her client's side of the story in a way the plaintiff could really grasp:

“But let’s think for a moment how the situation could have been perceived from my client’s perspective. When you entered the store, you did not go directly to the checkout counter to explain that you were seeking to exchange the merchandise. Instead, you walked around the store looking at merchandise for quite some time. Can you see how my client could have believed that when you walked out of the store with the merchandise, you stole it?”

As a result of this discussion, the plaintiff was able to listen to the defendant’s position with an open mind. This, in turn, encouraged the defense to be more open when listening to the plaintiff’s perspective. When the parties began to discuss numbers, the lawyers for both the plaintiff and the defendant negotiated competitively. However, because both sides had taken time to truly listen to each other at the beginning, they had created a rapport that enabled them to reach a settlement. And indeed, a settlement was quickly reached.

Cooperative Negotiation – Content

The content aspect of cooperative negotiation focuses on the substantive terms of the negotiation. It involves exploring settlement options with the goal of finding a solution that creates value for both sides, or a solution that enhances one side without undermining the other. To be a cooperative negotiator regarding content, consider employing the following techniques.

- 1) Seek to understand the other side’s real, underlying interests. Parties sometimes have unstated interests that – once revealed and understood – can help lead to creative settlements.
- 2) Explore solutions that satisfy the interests of all parties.
- 3) Explore ways to satisfy the interests of other side that do not undermine your client’s interests.
- 4) Give something that has high value to other side but has low or no value to your client.

Here’s a simple example that brings together much of what I’m talking about.

After the plaintiff purchased a residential property, he learned the property was contaminated and sued the defendant to clean up the property.

During the negotiations, the plaintiff expressed his regret for having purchased the property at all. Upon hearing this, the defendant offered to buy the property from the plaintiff at its fair market value as if it were clean property. The defendant also agreed to be solely responsible for the cleanup. The plaintiff agreed.

The settlement satisfied the interests of both parties. It satisfied the plaintiff's interest to get out of the deal and to even make some money on the investment. It also satisfied the defendant's interest to spend the money on cleaning up the property rather than in litigation. As it turned out, after the defendant cleaned up the property, it sold the property at a profit.

This win-win result was only possible because the parties used a variety of the cooperative negotiating techniques I've discussed: they shared their stories in a way the other side could understand; they *listened* to the other's story; they sought and found a hidden, underlying interest ("I wish I'd never bought this property"); and they explored creative solutions that satisfy the interests of all parties.

Strategic Cooperation Can Give Your Client an Advantage

Lawyers who know how to negotiate cooperatively can fare better in mediation, often better than their counterparts who only know how to be aggressive and unyielding.

Again, let me stress that competitive negotiation skills are critical to a good result. But adding cooperative techniques to your negotiating arsenal – and knowing when to employ these techniques in mediation – can often yield dramatic results for your client.