



The Three P's of Mediation Psychology

By Amy Lieberman

I don't know why we need a mediator. Can't we settle anything directly anymore?

— *familiar refrain from attorneys*

Success in mediation is not due solely to the mediator's innate ability or extensive experience. It is due to a team effort of lawyer, client and mediator. Similarly, the process is successful due to three other aspects: **process, positions and psychology.**

Process

Education: The mediation process involves education, as the parties gain increased knowledge about their opponent's and the mediator's evaluation of strengths and weaknesses, as well as motivations, driving forces and interests. A reality check may take finesse to communicate and may also take time for a resistant party to absorb.

Structure of Sessions: Is the joint session dead? Whether or not to hold a joint session, for process or for substance, should be a decision made on a case-by-case basis. In an early mediation, a substantive joint session may be critical to eliciting needed information. However, if the parties have a long and contentious personal history, or if discovery is largely complete, a joint session may not be desirable. Discuss this with the mediator in advance, so everyone is on the same page when they arrive.

Reciprocity: To some, the process can matter more than the actual outcome. No one ever accepts the first offer or capitulates to the first demand. There is a give-and-take reciprocal aspect to negotiation in mediation. The process includes testing each other's boundaries. This provides the assurance that each party needs that they, in the end, could not have done better. The extended process has value, as it meets the parties' needs for transactional utility, which means the need to feel that the process was fair.

Fluid Dynamic: It is critical for both lawyer and client alike to realize and embrace the importance of the fluid dynamic in mediation. Matching and pacing are not always the best moves; not everyone negotiates toward a mid-point. Trust the mediator, because he may have a sense that your carefully thought-out move will not work to move the process. This may upset your pre-planned strategy, but be willing to do something different and see where it goes. As one lawyer said at the conclusion of mediation, "Sometimes the process isn't pretty!"

Positions

Extreme Highs and Lows: If a lawyer starts off solidly in the range of a reasonable settlement, the other party will most certainly not perceive this as the case and will assume there is much more room available to negotiate. So, starting off fairly high, or low, is not a bad thing to do. But beware of extremes. While mediators know that opening demands and offers can be wildly unrealistic, and don't sweat it because they know that these positions often bear little resemblance to the final result, the extreme first demand or response can lead to the predictable emotionally reactive response of equal unreasonableness. All this does is delay ultimate resolution.

Moves Should Help the Process: Be sure to work with the mediator to make moves designed to help the process, not undermine it. Seek the mediator's input before making a counter. Don't walk out if you are angry about the other party's position. Send the mediator back to convey your strong desire to leave, but feel free to respond as you would have if they had come back with a number you thought was reasonable under the circumstances.

Beware of Empty Threats: For credibility purposes, don't ever say, "That's our final offer!" unless it is literally impossible for you to do anything further. This can impact your negotiations in the current and possibly future cases.

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Psychology

Reactive Devaluation: When your opponent or his counsel makes an offer when negotiating directly, that suggestion is typically met with resistance, due to the assumption that your opponent has a goal of winning as much as possible, to serve his own best competitive advantage, without regard to your interests. This phenomenon of reflexive resistance is known as reactive devaluation.

One of the primary reasons that mediation works is that it avoids the defensive discounting barrier that reduces the legitimacy of offers due to the source. Parties are far more likely to accept suggestions and guidance from an unbiased third person whose only goal is to help them find peace.

Strong Emotion: Keen legal analysis and persuasion is essential, as the mediator discusses and advocates strengths and weaknesses all daylong. However, also critical to the success of mediation is the ability to assist the parties in dealing with strong emotion, including angry or tearful outbursts, as well as other psychological factors that can otherwise serve as obstacles to resolution, such as the need for acknowledgement and validation.

Trust can be shattered, reputations harmed, self-esteem destroyed, relationships impacted and savings accounts drained. The need to navigate the emotional river is as strong as the need to accurately assess the legal landscape.

While lawyers may not be comfortable in the zone of emotion, mediators are, or at least they should be. Discuss any concerns you have about your client's state of mind with the mediator in advance. The mediator can appropriately address your client's needs to be heard, understood and when appropriate, validated.

What Lies Underneath: There is always an underlying driving force in any dispute. The mediator will look to what's behind the monetary demand or offer, to discover the interests, motivations and driving forces behind positions. Is it a feeling of disrespect? Anger at the injustice of harm that was not deserved? Resentment at the lack of warning before the other party took an action that ruined their life? Concerns about debt or financial insecurity? Frustration due to lack of acknowledgement? Or, perhaps, a compelling desire to seek revenge?

Once interests are correctly identified, the possibility for empathy exists. Concerns can be validated and more open discussions about how to meet those needs can occur.

Patience and Hope: The mediator has no skin in the game and will not react based on frustration when immediate resolution is not forthcoming. Patience and persistence are necessary prerequisites for the mediator, so that he can continue to support the parties in making progress. As long as the mediator remains optimistic, that optimism will instill the parties with hope. And, it is hope that will motivate the parties to keep the process going in the face of frustration at an apparent impasse.

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