

Mediation Pointers from a Distinguished Neutral

BY JEROME F. WEISS

For the past few years, I have circulated a bi-monthly newsletter that provides valuable mediation news and information for both disputants and their advocates and representatives. It's edited by my friend and colleague Keith Seat, my Co-Distinguished Fellow in the International Academy of Mediators (IAM). I have written an introduction to each of those newsletters and the following are excerpts from these useful observations. Anybody involved in mediation and negotiation should find a thoughtful and, hopefully, validating connection to what they do.

Venn Diagrams and Mediation

Some mediators use the Venn diagram to let disputants know that their two circles of opposing position can coincide to a degree in the setting of mediation. I use it a little differently: to point out the profound potential mediation has to offer in terms of exploring the differences and commonalities between the real world and the litigation world. Picture the Venn diagram as representing the real world in one circle and the litigation/dispute world in the other. Mediation is where these two circles — real life and conflict life — can coincide: a protected, privileged oval, if you will, that allows participants to probe and communicate so that they can reconcile two worlds in conflict.

Mediation allows us to admit that our positions in the disputative world may not necessarily fully resemble how things may exist in a more objectified context. It provides the grace and privilege with which to come off of our positions in order to achieve the higher virtue of resolution and reconciliation of conflicting views.

Self-Determination

Effective mediators have several things in common: recognition of the need for resolution and the concurrent desire to get everyone to cross the finish line together are high on the list. Whether for reasons of ego or altruism, or more probably somewhere in between, we want to get it done. However, that desire has to serve the self-determination of the participants. Everybody who has worked with me knows my feeling that mediation is first and foremost about the participants and *their* resolution of *their* dispute, along with a little help of course, from the neutral.

Too often we hear about the parties' satisfaction or dissatisfaction with a mediator being related to whether the dispute got resolved. Even though many of us are proud of a resolution rate, we need to remind the parties that successes and failures are more often than not related to their participation and their ability, not ours. Self-determination and a voluntary, un-coerced decision in which each party makes free and informed choices as to process and outcome is a cornerstone of most good neutrals' mediation philosophy and practice.

Mediation Advocacy

I often speak with participants and their representatives before and during mediations about the differences between litigation advocacy and mediation advocacy. From my neutral perspective, there are a multitude of distinctions; many of them profound. After all, mediation is not about the neutral pounding a gavel and getting it done. This is not our job. It is about the disputants and their representatives interacting and employing the power that is inherently theirs to come to a self-determined resolution. When

compared to litigation, the tone, decibel level and content of the mediation should be different. My experience and where we are in the mediation history curve tells me that not enough advocates understand these distinctions. The difference and balance between empathy — listening well without necessarily agreeing — and assertiveness — being able to advocate the position of the client, lies at the heart of good mediation advocacy.

It's Never About What It's About

I feel energized after coming back from meetings of the International Academy of Mediators (IAM), where I am a Distinguished Fellow, partly because of a renewed sense of my ability as a neutral to add significant value to the dispute resolution process.

One such recent program theme was "Fear, Anger and Risk in Mediation." As the title suggests, the emotional dynamic of disputes is too often overlooked in a competitive and distributive process where the dollars are many times the only focus of disputants and their representatives. We mediators have to contend with participants who, in their drive to get it done, have their respective litigation vehicles at full throttle, even in the mediation. In that hard, final push to cross the finish line, emotions and personal issues that run deeply throughout the dispute can be overlooked. Unless they are addressed, valuable time may need to be spent on repair. Momentum can be lost. Part of our job as neutrals is to remind participants to step back a bit and understand that the dispute may be about more than just the money. Complex and varied emotional and personal issues may need to be reckoned with. This is not always a simple task. It requires the skill

and understanding of the participants and the neutral who helps guide them.

Magic Wands

We neutrals often find our backs becoming sore at the end of a hard day's work because of all the water we have to carry between disputants. Things like "Go tell 'em that their star witness is going to get crushed because of our newly discovered evidence" or, "They ought to know that the cases in such and such a court of appeals certainly don't support their position." My response, more often than not, is to throw it back at the disputant or their representative, telling them that they know the facts and law much better and have lived with the dispute much longer than I have and it should be they, therefore, who are delivering the message. Not me. Having been challenged to re-convene the joint session, they either retreat from having the mediator deliver their message or reconvene the joint session.

Such events are often the manifestation of missing elements of the mediation advocacy skill set, where the art of talking with, and not at, each other needs refinement. It is almost as if those who have been making the war and realizing that it is not accomplishing the goal of resolution, now expect the neutral to wave his or her magic wand in order to make the peace.

I am always emphasizing the importance of the art of mediation advocacy and how, without the magic powder, consisting in large part of mediation advocacy provided by the participants, the mediator's "magic wand" is merely a hollow wooden stick.

Respect

My initial approach with the parties is non evaluative ... sometimes painfully so with respect to merits and predicting outcome ... although I will not hesitate to let you know what it might take to resolve the dispute; my presumed area of expertise.

That said, evaluation sometimes is an effective tool; however, it needs to be done with the invitation of the parties and with an abundance of respect for the fact that the

dispute is theirs, not the neutral's. Opinion and evaluation has its time and place, but parties and counsel need to understand that the guy in the middle — me — is not rooting for more or less, greater or smaller, white hat or black hat. I'm rooting for resolution and the intangible virtues that come with it. It is out of an abundance of respect for participants, and lawyers, that I ought to do everything I can to let you own your resolution.

Mediator as Message Coach

It was George Bernard Shaw who said, "The biggest problem with communication is the illusion it has occurred." Leave it to Shaw. Parties to mediation too often engage in the process presuming certain messages have occurred: things such as why and how they got to mediation, negotiation positions coming into mediation, risk aversion levels, threshold statements relating to underlying willingness to collaboratively negotiate, and so on.

We mediators are often surprised because participants presume that all of the intended underlying messages and feelings related to prior communication have in fact been communicated when they usually have not: sometimes because they have been made in a competitive, usually litigational context that doesn't allow a full exploration of the message, sometimes because disputants and their representatives just aren't the great communicators they think they are. Clarity and openness of messaging is important foundational work that the professional mediator ought to understand and assist the parties with if the disputants are going to have their best shot at resolution. Messaging and its clarity is a very sophisticated skill that only training, experience and awareness affords. The sophisticated mediator can help.

Mediating With Emotion

New York financial guru Felix Rohatyn said that, "Most deals are fifty percent emotion and fifty percent business." And he was talking about commercial disputes, where we usually don't expect much emotional energy. I agree entirely. Yet, excluding

emotion from the negotiation is more the rule than the exception. Most folks just don't get it or don't want to get it and this flaw prevents parties from fully utilizing everything that a mediation can provide and often leaves them short of the satisfaction and resolution mark.

The effective mediator is there to help disputants truly appreciate the other side of the story, thereby helping to appreciate and tell their own side, including the emotion. Wringing out the biases of the legal competition so that we can include a complete understanding of the opposing side can truly elevate the mediation to something unique and maybe inspiring. More importantly, it helps us succeed with resolution.

Candor: A Two-Way Street

Disputants often ask for my candid evaluation or opinion. Most of you who know my style and philosophy of mediation, know my feeling that a neutral's opinion can be toxic — or healing — depending on how firmly certain beliefs are held and how and when evaluation is shared. One of the foundations of effective opinion-sharing is the candor of the participants with the process; put another way, how honest you are with the process with respect to such things as uncertainty of outcome and the various risks to your client. I often tell people that I will be honest with them as long as they are honest with the process. It is this kind of candor that allows people to break through the dispute and sparring and become able to reap the virtues of closure and control.



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