



## **IN MEDIATION WE TRUST**

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As a mediator, I am a hopeless optimist. But even I was worried about one of my recent mediations. The subject was the multi-million-dollar sale of a 15-year-old home. The buyer discovered that final approvals by the permitting authorities had never been issued.

The buyer's attorney was prepared to file an action immediately after the conclusion of the contractually required mediation. The defense attorney said plaintiff would not provide details of its claims, and anyway, the alleged deficiencies were minor requirements the seller thought had been satisfied. The broker, which is not contractually required to participate in the mediation, nevertheless attended with counsel and the two agents.

The plaintiff and defense attorneys' styles led to serious clashes on the pre-mediation occasions that they spoke about the case. The first words from all of the participants were, predictably, "I am not expecting this case to settle today." Translation: "We're all just checking the box of this contractual condition, so we can move on to litigation."

At the conclusion of about 4.5 hours, the parties and attorneys had agreed to an initial step-by-step plan to move forward with a joint investigation and fix.

Why didn't we all go home after 30 minutes? I'll stop patting myself on the back for a moment, and break down the techniques that completely transformed this particular mediation. These techniques have the potential to restore respect, patient listening, and collaborative problem-solving in highly contentious cases.

### **A. The Mediation Was Held in Person.**

Statistically, virtual mediations have about the same success rate as in-person mediations.<sup>1</sup> The subject matter of some cases sometimes suggests an in-person mediation might have a better outcome, for example, some family business and trust and estate disputes, partnership disputes, and an occasional personal injury or first party insurance bad faith case. Most real property purchase and sale cases can be successfully mediated and settled virtually.

Not this one. Despite the many clashes, both plaintiff's and defendant's attorneys had the wisdom to recognize the potential value of a face-to-face, or at least room-to-room, meeting. Here, the subtle re-connections of buyer and seller when we all initially walked into the mediation space **revealed mutual commitment to the process**. They all cared enough to show up in person.

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<sup>1</sup> The National Academy of Distinguished Neutrals, *Survey of Litigators on Virtual Mediation (Comparing Responses from Sep 2020 to Sep 2022)*.



## **B. A Mix of Private Caucuses and Joint Sessions Facilitated Communications and Allowed the Participants to Move Forward Constructively.**

I laid out a preliminary framework before the mediation. Nobody objected, either in advance or at the session:

- Separate initial meetings with buyer, seller, and broker to seek agreement to a short joint opening session with *only* the mediator speaking about the process.
- Brief joint opening session. This saved time because I did not have to do the introductory spiel three times. I set a tone of optimism and mutual respect. I genuinely elevated the attorneys by describing their difficult roles and responsibilities; clients do not usually understand this. I also explain *my* expectations about participants' interactions.
- Possible variety of joint sessions, e.g., attorneys only, all participants, attorneys with one party at a time, and any other appropriate permutations. This array of options helps the participants to understand that there will be options for positional *and* collaborative engagement in the mediation session.

This framework allowed the participants to informally air claims and defenses and ultimately to consider a joint process for finding solutions. This is an uncommon mechanism, usually precluded by counsel, whose concern is to avoid making things worse at the outset.

It is critical for the mediator to have a firm hand in directing the nature and extent of discussion. The ability to do this with humor, respect, *and* authority takes practice and confidence. I do not tolerate any aggressive, dismissive, impolite, or disrespectful words, actions, body language, etc. Explaining this through mock eye-rolling, heavy sighs, sharp whispers to counsel, or ferocious note-taking lightens the mood.

## **C. The Clients Were Involved in the Discussions.**

Clients' active participation in the mediation imbued the communications with integrity and sincerity. These early interactions can highlight well-meaning parties' intentions before they marry the truths that fit their positions.

Moderated direct communication avoided the mediator "filter," which can sometimes dilute parties' focus points, and even omit seemingly minor facts or context on which there may be actual agreement!

The clients had opportunities to discuss their goals and concerns. Direct communication demonstrated plaintiff was not overreaching and defendant wanted to explore a fix that was realistic in scope.



Sharing photos and videos, reviewing the timeline, and identifying interactions with third parties helped flush out details. They had opportunities to figure out how they got to this point, without the constraints of formal discovery requests and responses. This approach revealed an unexpected, mutually genuine desire to get to the bottom of the problem and figure out the fix. The litigation invisibility cloak lays at the ready, but the effort to jointly determine what actually happened, and the parties' developing confidence in each other as decent *people*, encouraged them to move forward collaboratively.

**D. The Attorneys Were Given Time to Demonstrate Their Litigation Skills.**

Attorneys need to be prepared, flexible, and brave to engage in this sort of mediation process. They have developed initial impressions of the others in the case. In joint session variations, the attorneys *subject themselves* to the tactics of their opponent. I apply the brakes when I think it is appropriate.

**E. The Attorneys Were Given Time to Demonstrate Their Constructive Negotiation Skills.**

With clients and counsel as solid teams, useful discussion unfolded. With occasional sparring and flashes of understanding, the attorneys transformed from trial lawyer to counselor, to creative solution seeker, able to wear all three hats at once. The attorneys successfully walked the fine line between litigator and counselor.

**CONCLUSION**

Taking cues from the participants, a nimble mediator can change the tone and relational dynamics of even the most entrenched adversaries. Promoting a smorgasbord of conference styles in this case reduced deep distrust among the participants.

Most importantly, all participants discovered that with the guidance of a dedicated mediator who cares about their case and aims for de-escalation, their emotions were in check and their heads were clear. In that state of mind, all were willing to collaborate and able to make sound decisions about steps toward resolution.

We ended the day with agreement on a plan of action and to remain accountable to me for forward progress. All of the participants helped develop this cautious process toward finding a mutually beneficial result. I'll also resume patting my back...